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Supreme Court, U.S.
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OFFICE OF THE CLERK

NO. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 2002

JUAN GARCIA ABREGO,
Petitioner,
vs.
UNITED STATES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Petitioner was denied his right to due process and equal protection of law, as guaranteed by the Fifth Amendment to the United States Constitution, when his timely appeal from the denial of his motion for new trial based upon newly discovered evidence, pursuant to Rule 33 (b)(1), Federal Rules of Criminal Procedure, was terminated because a certificate of appealability was not issued in a contemporaneous timely appeal from the denial of his motion pursuant to 28 USC §2255?

LIST OF PARTIES

1. United States of America
2. Juan Garcia Abrego

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OPINIONS BELOW

On June 7, 2002, Judge Ewing Werlein, Jr., in a Memorandum and Order, which appears in Appendix A to this Petition, denied Juan Garcia Abrego's timely motion for new trial based on newly discovered evidence and request for discovery (hereinafter motion for new trial) pursuant to Rule 33 (b)(1), Federal Rules of Criminal Procedure, and further denied his motion pursuant to 28 USC §2255. Judge Werlein additionally refused to issue a certificate of appealability with respect to the 2255 motion. On June 17, 2002, Mr. Abrego filed a Notice of Appeal from the District Court's Order and Final Judgment, which denied Mr. Abrego's 28 U.S.C. § 2255 motion and denied a certificate of appealability as to that decision. On July 29, 2002, Judge Werlein granted leave to file an amended notice of appeal, which appears in Appendix B to this Petition, clarifying that Juan Garcia Abrego was appealing both the denial of the motion for new trial and the denial of his motion pursuant to 28 USC §2255. By letter from the Clerk of the Court, dated August 5, 2002, which appears in Appendix C to this Petition, Mr. Abrego was notified that the various appeals filed in this matter were to proceed under Fifth Circuit Case Number 02-20723.

On October 7, 2002, Circuit Judge Harold R. DeMoss, Jr., denied a certificate of appealability regarding Petitioner's appeal from the denial of the 28 USC §2255 motion. Judge DeMoss' Order appears in Appendix D to this Petition. Subsequently, counsel for Petitioner was orally informed by Clerk Sutton of the United States Court of Appeals for the Fifth Circuit that the denial of the certificate of appealability terminated all of Petitioner's appeals, including his appeal of right from the denial of the motion for new trial. Thereafter,

on November 11, 2002, a panel of the United States Court of Appeals for the Fifth Circuit denied Petitioner's motion for reconsideration of the denial of a certificate of appealability. The panel's decision appears in Appendix E to this Petition.

Petitioner then moved for a briefing schedule for his appeals on his motion for new trial based on newly discovered evidence and Clerk Sutton responded in a letter to Petitioner's counsel, stating that the Fifth Circuit had issued its final ruling and no briefing schedule would issue. The January 30, 2003 letter from Clerk Sutton appears in Appendix C to this Petition.

BASIS OF JURISDICTION

Because the United States Court of Appeals for the Fifth Circuit erroneously refused to hear Petitioner's appeal of right from the district court's denial of his motion for new trial, this Court's jurisdiction is invoked under 28 USC §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment; 28 USC §1291; Rule 33 (b)(1), Federal Rules of Criminal Procedure; and Rule 4 (b)(1)(A)(i), Federal Rules of Appellate Procedure are set forth in Appendix F to this Petition.

STATEMENT OF THE CASE AND FACTS

Petitioner, Juan Garcia Abrego, respectfully prays that a Writ of Certiorari issue to review the decision of the United

States Court of Appeals for the Fifth Circuit that the denial of a certificate of appealability with respect to a petition pursuant to 28 USC §2255 has the effect of precluding the separate appeal from a final judgment denying a motion for a new trial, even though said judgment is appealable as a matter of right. Fed. R. App. P. 4 (b)(1)(A)(I); 28 USC §1291.

Petitioner was convicted of various marijuana, cocaine, and money laundering offenses and sentenced to multiple concurrent terms of life imprisonment on February 3, 1997. His convictions were affirmed on appeal in *United States v. Garcia Abrego*, 141 F.3d 142 (5th Cir. 1998) His petition for writ of certiorari from that decision was denied on October 5, 1998. 525 U.S. 878, 119 S.Ct. 182 (1998). His petition for rehearing was denied on November 30, 1998. 525 U.S. 1035, 119 S.Ct. 582 (1998).

On September 17, 1999, Petitioner filed timely motions for a new trial under Rule 33 (b)(1), Federal Rules of Criminal Procedure, and for collateral relief under 28 USC §2255. In support of these motions he alleged that he had learned that a primary prosecution witness, Carlos Resendez, had committed perjury during his trial. In addition, when Resendez falsely testified that he was not seeking the $2,000,000 reward for having arranged Petitioner's arrest, his perjury was known to the prosecution. In fact, the government had not only agreed to pay Resendez the $2,000,000 reward, it had also agreed to purchase all of Resendez's Mexican real estate holdings, provide Resendez and his family with U.S. citizenship, and secure employment for Resendez and his family and other financial incentives in return for Resendez's testimony against Petitioner.

In addition to alleging that Resendez had been instructed to untruthfully deny he had discussed the reward money with government agents, Petitioner also alleged that the government sought to conceal that Resendez's former mistress, Noema Quintanilla, had actually provided the information leading to Petitioner's arrest, and instructed Resendez to falsely testify that it was he who had provided the information. As a result of this misconduct, the jury was materially misled by perjured testimony that was known to, but not corrected by, the prosecution.

Petitioner initially submitted two declarations from investigator Manny Lopez in support of his petition. In his declarations, Mr. Lopez detailed a conversation that he had Carlos Resendez and provided information gained from six conversations with Resendez's Mexican attorney, Raquenel Villanueve-Fraustro. On June 7, 2002, after supplemental briefing by both sides and after additional declarations had been filed by Lopez and Villanueve-Fraustro, the District Court struck Lopez's declarations as hearsay, but accepted as true the allegations in Villanueve-Fraustro's declaration that prior to Petitioner's trial, the government entered an agreement with Resendez to: (1) purchase Resendez's properties in Mexico; (2) provide Resendez and his family with U.S. citizenship; (3) change Resendez's identity and provide him with personal protection; (4) purchase a house for Resendez in the United States; and (5) obtain employment for Resendez in the United States.

Although the District Court concluded that the suppressed information would have had impeachment value, it held that it was not "material" and refused to find that government had permitted Resendez to commit perjury. On this basis, the

District Court denied Petitioner's motions for new trial and for relief under 28 USC §2255. In that same Memorandum and Order, the District Court denied Petitioner a certificate of appealability regarding his 28 USC §2255 motion.

Petitioner filed a timely notice of appeal on June 17, 2002 [02-20723], and was ultimately granted leave to enlarge the time (until July 12, 2002) to file his Amended Notice of Appeal [02-20820] to clarify that he was appealing from both the denial of his motion for new trial[1/] and from the denial of his motion pursuant to 28 USC §2255.

In the United States Court of Appeals for the Fifth Circuit, the three case numbers assigned to Petitioner's appeals of the denial of both motions were combined into one case number, 02-20723. On October 7, 2002 his application for certificate of appealability was denied by a single judge. Having learned from Clerk Sutton that the appellate court's denial of his request for a certificate of appealability would be treated as terminating all the appeals combined under case number, 02-20723, Petitioner filed a motion for reconsideration, seeking to reinstate his appeal as of right from the motion for a new trial. Petitioner sought to clarify that the denial of the certificate of appealability only applied to the appeal of his petition pursuant to 28 USC §2255 and that a briefing schedule would have to be established for the appeal of the denial of his motion for a new trial.

[1/] In his request to extend time to file an amended notice of appeal, Petitioner also submitted a Proposed Second Notice of Appeal, which was given Fifth Circuit No. 02-20823.

This motion for reconsideration was opposed by the government, which argued that the denial of the certificate of appealability precluded Petitioner from appealing the denial of his motion for a new trial. On November 11, 2002, a panel of the United States Court of Appeals for the Fifth Circuit summarily denied the motion for reconsideration. The order never mentioned that Petitioner was appealing the denial of a motion for new trial. *See* Appendix E.

Petitioner then moved for a briefing schedule with respect to his appeals from the denial of his motion for new trial, but his counsel was informed by letter from Clerk Sutton on January 30, 2003 that the Fifth Circuit had already issued its final ruling and that no briefing schedule would be ordered. *See* Appendix C.

REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted and this Case Remanded for a Briefing Schedule to Be Ordered for Petitioner's Appeal from the Denial of His Motion for New Trial for Newly Discovered Evidence.

The issues presented in this petition are of far-reaching and national importance. This petition's essential question asks this Court to give definition to the expression, "meaningful appellate review." The answer to be given affects not only the appellate practice of an entire federal circuit, it also has a significant impact on every federal criminal appeal in this country. By rejecting appellant's appeal of right along with his discretionary appeal, the Fifth Circuit Court of Appeals essentially truncated the procedural

avenues available to Petitioner following the district court's denial of his motion for a new trial.

Review and jurisdiction in this Court are appropriate because the practice of the Fifth Circuit Court of Appeals departs from Federal Rules of Criminal Procedure and conflicts with the applicable decisions of this Court. Sup. Ct. R. 10(a),(c). The specific issue raised is an important question of federal law that this Court has not settled or addressed. Sup. Ct. R. 10(c).

Petitioner's motion for new trial was part of his underlying criminal case (H-CR-167-8) and was authorized by Rule 33 (b)(1), Federal Rules of Criminal Procedure. The denial of that motion, a final order, is made appealable as a matter of right by Rules 3 and 4 (b)(1)(A)(i), Federal Rules of Appellate Procedure. *See also* 28 USC §1291. That appeal must generally be filed within 10 days of the entry of judgment, and it was clearly with the intent of perfecting the appeal of this issue that Petitioner filed his initial Notice of Appeal in this case on the tenth day after the court's judgment. As is further provided by the Rules, that time was extended an additional 30 days in order to clarify the extent of the matters that Petitioner was challenging on appeal.

Had Petitioner only appealed from the motion for new trial, there is no question that his case would have been assigned a briefing schedule and that he would have been entitled to have the circuit consider the case on the basis of an opening (either of 30 pages or 14,000 words) and reply brief(15 pages or 7,000 words). *See* Rules 28 (a) and (c) and 32 (a)(7) (A) and (B), Federal Rules of Appellate Procedure. In addition, Petitioner should have had the right to request

oral argument with the presumption that oral argument would be granted. Rule 34, (a)(1) and (2), Federal Rules of Appellate Procedure. An appeal as a matter of right is decided by a three judge panel of the Circuit.

There was no legal basis by which this nondiscretionary appeal from a final judgment in a criminal case should have been affected by the incidental and separate appeal from Petitioner's distinct motion pursuant to 28 USC §2255, which was a civil filing that was docketed under a different civil case number (H-CV-3110). As a civil matter, the time to seek an appeal from this judgment was 60 days after entry of judgment or the order appealed from.[2/] *See* Rule 4 (a)(1)(B), Federal Rules of Appellate Procedure (when the United States is a party). Rather than wait 60 days, however, Petitioner sought to appeal all of the court's orders, which had been combined in a single judgment, within the 10-day filing period for a criminal appeal. In contrast to a motion for new trial for newly discovered evidence, an appeal from the denial of a motion under 28 USC §2255 is not as a matter of right; instead, it can be entertained only with permission of a Judge of the District Court, Court of Appeal, or this Court. *See* 28 USC §2253 (b). A request for a certificate of appealability in the Circuit is a motion limited to 20 pages (Rule 27 (d)(2),

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[2/] There was no need for the District Court to allow leave to file an amended notice of appeal if the District Court felt that the appeal was only from the denial of the motion pursuant to 28 USC §2255, and that motion was dispositive of everything, as the amended notice of appeal was lodged (on the 35th day, July 12, 2002) with the District Court well within the 60 days to file a notice of appeal from the denial of a 28 USC §2255 motion.

Federal Rules of Appellate Procedure), contains no provision for oral argument and may be decided by a single Circuit Judge.[3/] *See* Fifth Circuit Rule 27.2.3.

In this petition, Mr. Abrego contends that due process demands that an appeal of right be afforded a full briefing and full consideration in the way of oral argument and diligent and conscientious review by three circuit judges. Whatever procedures are sufficient for a second attempt to secure a certificate of appealability for a separate matter calling for discretionary review, these lesser standards cannot be bootstrapped into obviating a meaningful appeal of right when one is guaranteed to petitioner by statute. By entering what amounted to a summary rejection of Petitioner's contentions, the Fifth Circuit essentially treated the merits of Petitioner's motion for new trial and its appeal as an exercise in futility. At least as troubling is the fact that the procedures relied on, which permit a clerk to reject a nondiscretionary appeal on the basis of the denial of a certificate of appealability from a separate order, are nowhere described in the Federal Rules or the rules of the circuit. As presently

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[3/] For the substantive differences between the motions*see United States v. Prescott*, 221 F. 3d 686, 688-689 (4th Cir. 2000). Further, the motions are reviewed on appeal by different standards in the Fifth Circuit. *Cf. United States v. Burnes*, 668 F.2d 855 (5th Cir. 1982)(Rule 33 denial reviewed for abuse of discretion) and *United States v. Alvarado*, 898 F.2d 987, 994 (5th Cir. 1991)(same), with *United States v. Willis*, 273 F.3d 592, 595 (5th Cir. 2001)(district court's findings of fact in denying a 2255 motion are reviewed for clear error and questions of law are reviewed *de novo*).

construed, an appellant can only guess what course of action will preserve the merits of an appeal for meaningful review.

Mr. Abrego was entitled to have his appeal as of right reviewed in a manner that was neither arbitrary nor capricious and reflected the principles of fundamental fairness that are embodied in the Due Process Clause of the Constitution. He can hardly perceive that this right was protected in light of the manner in which the Court disposed of his contentions.

This Court has long eschewed arbitrary procedures that have had the effect of cutting off a defendant's right to have a judgment reviewed on appeal. *Coppedge v. United States*, 369 U.S. 438 (1962). Analogous to the action taken on Petitioner's request for a certificate of appealablity, a petition to proceed in *forma pauperis* may be denied if the trial court certifies in writing that it is *not taken in good faith*. 28 USC §1915. While an appeal of right as to which there has no assertion of indigence and no request to waive fees is not subject to such "pre-screening," the granting of a certificate of appealability in a habeas case is a matter of pre-screening the merits of the issues raised by an appeal. Inasmuch as the Fifth Circuit has apparently used Petitioner's request for a certificate of appealability for the §2255 issues as a means to pre-screen his appeal of right, its action must, at a minimum, comport with previous authority of this Court, which has held that a determination as to the good faith of an appeal, which is sought to be taken in *forma pauperis*, cannot be used as a substitute for a determination of the appeal on its merits. Id.

This Court held that only the most frivolous appeals would be found to not meet the test of good faith. "[U]nless the issues raised (by the indigent seeking leave to appeal in

forma pauperis) are so frivolous that the appeal would be dismissed in the case of a nonindigent litigant, Fed. Rules Crim. Proc. 39(a), 18 U.S.C.A., the request of an indigent for leave to appeal in *forma pauperis* must be allowed." Id. at 447, 82 S.Ct. at 922 (quoting *Ellis v. United States*, 356 U.S. 674, 675, 78 S.Ct. 974, 975, 2 L.Ed.2d 1060 (1958)). Such a determination could only be made by an appellate court if, after appointing counsel and providing counsel with a record of sufficient completeness to enable counsel to attempt to make a showing, the appellate court was satisfied that the district court's finding of a lack of "good faith" was not in error. Id. at 445-446, 82 S.Ct. at 921-22; *see also Hardy v. United States*, 375 U.S. 277 (1964), Justice Goldberg concurring, at pp. 284-286.

However, the pleadings submitted to overcome a finding of lack of "good faith" and the ruling thereon was specifically determined by this Court as not being the equivalent of receiving a determination on the merits of the appeal.

> "Contrary to the Government's assertion here that petitioner has already received what amounts to plenary review of the conviction following his second trial, we hold petitioner has not yet received the benefits of presenting either oral argument or full briefs on the merits of his claims to the court first charged with the supervision of the trial court. n.18 The memoranda prepared by counsel in support of petitioner's application for leave to appeal in forma pauperis were not intended to be, nor are they rightly considered as, full appellate briefs. But they do serve to demonstrate that petitioner sought consideration of issues that it would be difficult for an appellate court

to consider so patently frivolous as to require a dismissal of petitioner's case without full briefing or argument." (Footnote omitted.)

Coppedge v. United States, *supra*, 369 U.S. at pp. 452-453. See also the concurring opinion of Justice Stewart, joined by Justice Brennan, *Ibid.* 369 U.S. at 456-457.[4/] Certainly, it cannot be said that there is anything patently frivolous about Petitioner's having newly discovered the perjury and bias of the lead witness against him and alleging that the government was a party to that perjury. The procedure by which an

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4/ "The result is that a Court of Appeals may come to think of these preliminary proceedings as tantamount to appeals on the merits, and may tend to decide whether or not to grant leave to appeal by appraising the entire case in terms of whether or not reversible error appears. By the same token, when leave to appeal has been denied, and the case has come here, the Government has argued in the past, as it argues in this case, that the preliminary screening procedure was itself the equivalent of an affirmance on the merits. *See Lurk v. United States*, 366 U.S. 712. ¶ This attempted conversion of the proceedings to determine good faith into a truncated substitute for appeal distorts the purpose of § 1915, and, if accepted, would raise serious questions of due process. The filing of memoranda in support of an application for leave to appeal is not an appeal. The merits of the ultimate issues are not logically involved at this point, but only the weight of those issues. Appellate briefs are not written or submitted. There is no oral argument. The court's mode of considering such memoranda, as a matter of internal machinery, may markedly differ from the process employed in the decision of cases actually on appeal. For all these reasons the interim proceeding permitted by § 1915 cannot itself be deemed to constitute the appeal to which a person convicted of crime in the federal courts is entitled."

indigent defendant overcomes a finding of lack of "good faith" is similar to that is necessary to obtain a certificate of appealability when there has been no decision on the merits of the petition. In such a case, the certificate should issue as to the merits so long as the petition states a valid claim of the denial of a constitutional right. Cf. *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604 (2000); 28 USC §2253.

As pointed out in *Coppedge v. United States*, *supra*, 369 U.S. at p. 440, fn.1, this Court had good reason for insisting on plenary review for cases that were to be appealed as a matter of right. In the previous five Terms, it had already found it necessary in 14 cases to vacate and remand because the Court of Appeals had applied erroneous standards in passing on an indigent's application for leave to appeal. This Court cited a number of instances in which appeals had resulted in reversals of convictions after leave to appeal in *forma pauperis* had initially been denied by the district court. *Ibid.* at p. 459 n.16 (citing *Jones v. United States*, 105 U.S.App.D.C. 326, 328, 266 F.2d 924, 926 (1959) (reversal ordered in 11 of 24 cases in which leave to proceed *in forma pauperis* was initially denied)).

In *Slack v. McDaniel*, *supra*, this Court concluded the pre-1996 standard, set forth in *Barefoot v. Estelle*, 463 U.S. 880 (1983), for issuing a certificate of probable cause was the same standard to be applied for issuing a certificate of appealability and that to obtain a certificate of appealability, the moving party need only demonstrate that "reasonable jurists could debate (or for that matter agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" (*Slack v. McDaniel*, *supra*, 529 U.S. at p.

484.) This Court rejected the conclusion by the Court of Appeals that a higher standard was necessary to obtain a certificate of appealability. Further, this Court required a certificate of appealability to issue, even though one had previously been denied by the District Court and the Court of Appeals. *McDaniel* again demonstrates the weakness of "pre-screening" review. In this case, it has denied Petitioner the full briefing and oral argument to which he is entitled, as a matter of right, not discretion. *Coppedge* and *McDaniel* clearly refute the contention made by government's argument below that a ruling on whether to issue a certificate of appealability suffices to constitute a decision on the merits of an appeal.

Nonetheless, *Coppedge* and *McDaniel* address only the issue of how a court should exercise its discretion to grant or deny review. Petitioner, however, is not challenging the Fifth Circuit's decision to reject his discretionary appeal of his 28 USC §2255 motion. As set forth above, the absence of a certificate of appealability has nothing to do with Petitioner's right to an appeal from the denial of his motion for a new trial. Unlike his petition for §2255 relief, Petitioner had a due process and equal protection right to receive a full briefing on the merits and the opportunity for oral argument. It cannot be that the mere fact that Petitioner also had pending a discretionary appeal under 28 USC §2255 could defeat what was otherwise his appeal as of right from the denial of his motion for new trial.

This is made clear under cases dealing with the requirements imposed on States when the States elect to allow appeals as a matter of right. While States are not required to provide for appeals as a matter of right (*see McKane v.*

Durston, 153 U.S. 684, 687 (1894), concluding States not required to allow an appeal as a matter of due process), once States allow such appeals, the States are restricted by the "due process" and "equal protection" clauses of the Fourteenth Amendment as to what they can and cannot do. *See Evitts v. Lucey*, 469 U.S. 387 (1985); *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956).

The federal criminal appellate system allows an appeal as a matter of right. *Hardy v. United States*, *supra*, 375 U.S. at p. 278. Therefore, as with States, this right can not be arbitrarily denied. While the Fourteenth Amendment does not by its terms apply to the Federal Government, the Fifth Amendment contains a "Due Process" clause, as does the Fourteenth Amendment, and the concept of equal protection of the laws is incorporated into the "Due Process" clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954). Therefore, cases requiring nondiscriminatory action with regards to State appeals are also applicable to appeals as a matter of right in the federal system. These cases demonstrate that Petitioner has been denied due process and equal protection of the law when his appeal as a matter of right was denied because he did not obtain a certificate of probable cause to obtain discretionary leave to appeal the denial of his motion under 28 USC §2255 appeal. [5/]

[5/] For a discussion of the constitutional difference between appeals as a matter of right and appeals as a matter of discretion, *see Ross v. Moffitt*, 417 U.S. 600 (1974), discussing whether states needed to appoint counsel to represent an indigent in preparing a petition for certiorari.

When an appellant's right to obtain the appointment of counsel in an appeal as a matter of right requires him to "run a gauntlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure." (*Douglas v. California*, 372 U.S. 353, 357 (1963).) Likewise, the right to a have such an appeal heard cannot be restricted because of the mere coincidence of having combined it with a discretionary appeal. Such arbitrary procedures do not "comport with fair procedure" and amount to a denial of due process of law and equal protection of the laws. Surely the federal appellate system, like the state appellate system, must be "free of unreasoned distinctions." (*See Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966).) To prohibit this Petitioner from proceeding with his appeal as a matter of right, merely because he could not pursue another separate appeal, clearly constitutes such an "unreasoned distinction." *See also Evitts v. Lucey*, 469 U.S. 387, 399-404[9] (1985).

Based upon the foregoing, certiorari should be granted and this matter remanded to the United States Court of Appeals for the Fifth Circuit for a briefing schedule to be set for Petitioner's appeal from the denial of his motion for new trial.

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[9] "A system of appeal as of right is established precisely to assure that only those who are validly convicted have their freedom drastically curtailed. A State may not extinguish this right because another right of the appellant -- the right to effective assistance of counsel -- has been violated."

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the decision of the United States Court of Appeals for the Fifth Circuit, effectively denying Petitioner his appeal as a matter of right from the denial of his motion for new trial for newly discovered evidence, because a certificate of appealability did not issue in a related discretionary appeal from the denial of a motion pursuant to 28 USC §2255. It is submitted that under these facts Petitioner was denied his right to due process of law and equal protection of the law, as guaranteed by the Fifth Amendment to the United States Constitution, when he was treated differently than any other individual seeking relief from the denial of a motion of new trial for newly discovery evidence and subjected to a "pre-screening" procedure that did not allow for a full brief on the merits of his claim, or an opportunity for oral argument.

Respectfully submitted,

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(2) Supreme Court, U.S.
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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Final Judgment and Memorandum and Order Denying Petitioner's § 2255 Motion and Denying Motion for New Trial and Request for Discovery. Entered on June 7, 2002.

APPENDIX B B-1
Order Granting Leave to File Amended Notice of Appeal. Entered on July 29, 2002.

APPENDIX C C-1
Letter from United States Court of Appeal dated August 5, 2002, Regarding Docketing of the Appeal

Letter from Clerk Sutton dated January 30, 2003 stating that briefing schedule would not issue. ... C-3

APPENDIX D D-1
Order Denying Appellant's Certificate of Appealability. Entered on October 7, 2002.

APPENDIX E E-1
Order Denying Appellant's Motion for Reconsideration of Denial of Certificate of Appealability. Entered on November 11, 2002.

APPENDIX F F-1
United States Constitution, Fifth Amendment; 28 U.S.C. §1291; Rule 33, Federal Rules of Criminal Procedure; Rule 4(b)(1)(A)(I), Federal Rules of Appellate Procedure

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CRIMINAL ACTION NO. H-93-167
CIVIL ACTION NO. H-99-3110

UNITED STATES OF AMERICA,

Plaintiff-Respondent,
v.
JUAN GARCIA ABREGO,

Defendant-Petitioner.

Entered on June 7, 2002

FINAL JUDGMENT

For the reasons set forth in the separate Memorandum and Order signed this day, it is

ORDERED and ADJUDGED that the case brought by Defendant-Petitioner Juan Garcia Abrego pursuant to 28 U.S.C. § 2255 against Respondent United States of America is DISMISSED on the merits; and it is further

ORDERED that a Certificate of Appealability is DENIED.

This is a **FINAL JUDGMENT**.

The Clerk shall enter this Order, providing a correct copy to all counsel of record.

SIGNED at Houston, Texas, on this 7th day of June, 2002.

EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,
Plaintiff-Respondent,
vs.
JUAN GARCIA ABREGO,
Defendant-Petitioner.

CRIMINAL ACTION NO. H-93-167
CIVIL ACTION NO. H-99-3110

Entered on June 7, 2002

MEMORANDUM AND ORDER

Pending are Defendant-Petitioner Juan Garcia Abrego's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Document No. 429), Defendant-Petitioner's Motion for New Trial (Document No. 431) and Request/Motion for Discovery (Document No. 432), and the Government's Answer and Request for Rule 8(a) Determination (Document No. 441).[1/]

[1/] Shown still pending are Defendant-Petitioner's Motion for Leave to File Reply to Government's Supplemental Agreement and Authority, Etc. (Document No. 458), the United States's Request for Leave to Respond, Etc. (Document No. 464), and the United States's Motion for Leave to File Argument and Authority in Response to Declaration of Manny Lopez, Etc. (Document No. 465), all of which are GRANTED. In light of the rulings made herein on the principal motions, Defendant-Petitioner's Motion to

After having carefully considered the foregoing, Petitioner's Traverse and Reply (Document No. 447), the Government's Supplement to its Argument with Additional Authority (Document No. 448), Defendant-Petitioner's Response, Supplemental Argument and Declarations (Document No. 451), Declaration of Attorney Silvia Raquenel Villanueva Fraustro (Document No. 452), United States's Supplemental Argument and Authority (Document No. 455), Defendant-Petitioner's Reply to Government's Supplemental Argument (Document No. 458), Declaration of Manny Lopez Regarding Proffer (Document No. 463), United States's Argument and Authority in Response to declaration of Manny Lopez (Document No. 465), the affidavits and exhibits submitted in support of Abrego's request for relief, the record of proceedings before the District Court in the underlying criminal case, including the evidence and testimony received at trial, the opinion of the United States Court of Appeals for the Fifth Circuit affirming Abrego's conviction, and the applicable law, the Court ORDERS, for the reasons set forth below, that the Government's Request for Rule 8(a) Determination is GRANTED, Abrego's § 2255 Motion to Vacate, Set Aside or Correct Sentence, Motion for New Trial, and Motion for Discovery are all DENIED, and the proceeding Abrego instituted pursuant to 28 U.S.C. 2255 is DISMISSED on the merits.

Insure Availability of Material Witness Carlos Resendez (Document No. 433) and Defendant-Petitioner's Request for Expedited Evidentiary Hearing (Document No. 466) are DENIED as moot.

I. Purpose and Scope of 28 U.S.C. § 2255

Title 28 U.S.C. § 2255 provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Motions under § 2255 are reserved for claims of constitutional or jurisdictional significance. *United States v. Capua*, 656 F.2d 1033, 1037 (5th Cir. 1981); *Limon-Gonzalez v. United States*,499 F.2d 936, 937 (5th Cir. 1974). Relief under § 2255 is not available to correct trial errors which do not affect the validity of the conviction. Capua, 656 F.2d at 1037 ("Section 2255 does not offer recourse to all who suffer trial errors. It is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice.") (citations omitted). Indeed, "[i]f an error is not constitutional or jurisdictional, relief will lie under [28 U.S.C. § 2255] only if a defect is so fundamental that the substance of a fair trial has been denied." 3 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 593 (2d ed. 1982).

II. Procedural History

Defendant-Petitioner Juan Garcia Abrego ("Abrego"), who is in the custody of the United States Bureau of Prisons, is seeking federal habeas corpus relief under 28 U.S.C. § 2255. Abrego has not previously filed a motion pursuant to § 2255.

On September 24, 1993, Abrego was charged in a second Superseding Indictment with conspiracy to possess with intent to distribute cocaine, possession with intent to distribute cocaine, money laundering, conspiracy to import cocaine, conspiracy to commit money laundering, and conducting a continuing criminal enterprise. (Document No. 36). Abrego evaded arrest for several years following his Indictment. In 1996, he was apprehended in Mexico and brought to the United States for trial. A third Superseding Indictment was then returned charging him with one count of conspiracy to possess with intent to distribute five (5) kilograms or more of cocaine and one thousand (1,000) kilograms or more of marijuana in violation of 21 U.S.C. §§ 841(a)(1), (b) (1)(A), and 846 (count 1), ten counts of possession with intent to distribute five (5) kilograms or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1), (b) (1) (A), and 18 U.S.C. § 2 (counts 3-10, 17, 28), five counts of money laundering in violation of 18 U.S.C. §§ 1956 (a) (1) (A) (i) and 2 (counts 2, 11-13, 16), three counts of money laundering in violation of 18 U.S.C. §§ 1956(a) (2) (A) and 2 (counts 14, 15, 27), one count of conspiracy to import five (5) kilograms or more of cocaine in violation of 21 U.S.C. §§ 952(a), 960, and 963 (count 19), one count of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h) (count 18) and one count of conducting a continuing

criminal enterprise in violation of 21 U.S.C. § 848 (count 20) (Document No. 186) Following seventeen days of trial, the jury found Abrego guilty on all counts. (Document No. 366). Abrego was sentenced to life imprisonment on counts 3-10, 17, 20, and 28, and 240 months imprisonment on counts 2, 11-16, 18 and 27, with all terms running concurrently. See Judgment of Conviction (Document No. 387).

The United States Court of Appeals for the Fifth Circuit affirmed Abrego's conviction. *United States v. Abrego*, 141 F.3d 142 (5th Cir. 1998). On October 5, 1998, Abrego's petition for writ of certiorari to the United States Supreme Court was denied. (Document No. 419). Within one year after that ruling, Abrego filed this § 2255 Motion to Vacate, Set Aside or Correct Sentence (Document No. 429), along with a Motion for New Trial (Document No. 431). The Government filed a response to both motions, an opposition to Abrego's Request for Discovery, and a request for a determination under Rule 8(a) of the Rules Governing Section 2555 Proceedings that Abrego's claims, upon the record, have no merit and do not warrant an evidentiary hearing. Numerous additional submissions have since been filed by both parties and are mentioned in the opening paragraph above.

III. Issues Presented

In his § 2255 Motion to Vacate, Set Aside or Correct Sentence, Abrego claims that: (1) he received ineffective assistance of trial and appellate counsel; (2) the Government, in violation of *Brady v. Maryland*, 83 S. Ct. 1194 (1963), failed to disclose evidence of an agreement it reached with a key prosecution witness, and that the Government

knowingly presented false testimony from that same witness. In his Motion for New Trial, Abrego seeks a new trial on the basis of "new evidence," which he maintains supports the second claim.

IV. Rules 8(a) and 12

Rule 8(a) of the Rules Governing Section 2255 Proceedings, provides:

> If the motion has not been dismissed at a previous stage in the proceeding, the judge, after the answer is filed and any transcripts or records of prior court actions in the matter are in his possession, shall, upon review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice dictates.

Rule 12 of the Rules Governing Section 225 Proceedings authorizes the district court to apply the Federal Rules of Civil Procedure in a § 2255 proceeding when it deems such appropriate. Pursuant thereto, by Order entered December 14, 2000, the Court gave notice that Abrego's second claim would be evaluated within the framework of FED. R. CIV. P. 56, and granted leave for the parties to file affidavits and other competent evidence pertinent to that claim.

Based on an extensive review of the record and the parties' submissions, the Court concludes, for the reasons set forth below, that an evidentiary hearing is not necessary and

that Abrego's claims may properly be adjudged upon the record now before the Court.

V. Ineffective Assistance of Counsel Claim

Abrego's first claim is that he did not have effective assistance of counsel in violation of the Sixth Amendment. He maintains that his trial counsel was ineffective for: (1) failing to move for a change of venue given what he terms was the sensational and inflammatory pretrial publicity that saturated the community; (2) failing to object to Defendant's exclusion from the bench conferences during voir dire; (3) failing to compel the Government to provide information regarding its cooperating witnesses; and (4) failing to object to or move to strike objectionable witness testimony and evidence, and eliciting prejudicial testimony on cross-examination. In addition, Abrego maintains that his appellate counsel was ineffective for failing to raise on appeal the complaint that he had been excluded from the bench conferences during voir dire.

Claims of ineffective assistance of counsel are generally measured by the standards of *Strickland v. Washington*, 104 S. Ct. 2052 (1984). Under *Strickland*, a petitioner must be able to show that his counsel was deficient and that the deficiency prejudiced him to the extent that a fair trial could not be had. *Id.* at 2064. Deficiency is judged by an objective reasonableness standard, with great deference given to counsel and a presumption that the disputed conduct is reasonable. *Id.* at 2064-66. The prejudice element requires a petitioner to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 2068. A

petitioner has the burden to prove both the deficiency and the prejudice prongs in order to be entitled to relief. *United States v. Chavez*,193 F.3d 375, 378 (5th Cir. 1999).

Under *Strickland*, judicial scrutiny of counsel's performance is highly deferential and a strong presumption is made that "trial counsel rendered adequate assistance and that the challenged conduct was the product of reasoned trial strategy." *Wilkerson v. Collins*, 950 F.2d 1054, 1065 (5th Cir. 1992) (citing *Strickland*), *cert. denied*, 113 S. Ct. 3035 (1993). In order to overcome the presumption of competency, a petitioner "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland*, 104 S. Ct. at 2066. Under the prejudice prong of *Strickland*, a petitioner must be able to establish that absent his counsel's deficient performance the result of his trial would have been different, "and that counsel's errors were so serious that they rendered the proceedings unfair or the result unreliable." *Chavez*, 193 F.3d at 378. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 104 S. Ct. at 2066.

Constitutionally effective assistance of counsel under *Strickland* is not errorless counsel. The determination whether counsel has rendered reasonably effective assistance turns on the totality of facts in the entire record. Each case is judged in the light of the number, nature, and seriousness of the charges against a defendant, the strength of the case against him, and the strength and complexity of his possible defense. *Baldwin v. Maggio*, 104 F.2d 1325, 1329 (5th Cir. 1983), *cert. denied,* 104 S. Ct. 2669 (1984). The

reasonableness of the challenged conduct is determined by viewing the circumstances at the time of that conduct. *Strickland,* 104 S. Ct. at 2066. Counsel will not be judged ineffective only by hindsight.

Claims of ineffective assistance of appellate counsel are assessed under the same two-part *Strickland* deficiency and prejudice standard as claims of ineffective assistance of trial counsel. *Williams v. Collins*, 16 F.3d 626, 635 (5th Cir.), *cert. denied*, 115 S. Ct. 1289 (1994). When ineffectiveness claims are based on appellate counsel's failure to raise certain issues on appeal, the petitioner has the burden of showing that his appeal was significantly prejudiced by his appellate counsel's deficient performance. *Armstead v. Scott*, 37 F.3d 202, 207 (5th Cir. 1994) (significant prejudice must be shown in a noncapital context), *cert. denied*, 115 S. Ct. 1709 (1995).

At the outset, the Court observes that the attorneys who represented Abrego during the pretrial proceedings, during trial, and on appeal are some of the luminaries of the criminal defense bar in America.[2/] Their collective representation of

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[2/] Abrego's lead lawyers during the trial were J. A. "Tony" Canales and Michael Ramsey. Gerald H. Goldstein was Abrego's appellate counsel and, prior to his disqualification in the district court due to a conflict of interest with a Government witness, was also co-counsel for Abrego during much of the pretrial proceedings. *The Texas Legal Directory, 2001* , provides biographical information that supplements the Court's first hand impression about these respected attorneys.

Mr. Canales, admitted to the Bar in 1969, was the United

Abrego was stellar, meeting and often exceeding even the elevated expectations that the Court had for these highly accomplished lawyers.

A. Change of Venue

In his first ineffectiveness claim, Abrego faults his counsel for not seeking a change of venue. According to Abrego, given the sensational and inflammatory pretrial publicity surrounding his case, his trial counsel should have concluded that it was virtually impossible to obtain an impartial jury in this community and, consequently, should have moved for a change of venue.

States Attorney for the Southern District of Texas from 1977 to 1980, is Board Certified in Criminal Law, Texas Board of Legal Specialization, and has a renowned reputation as one of the State's most outstanding criminal defense attorneys.

Mr. Ramsey, admitted to the Bar in 1965, is another of this State's most preeminent criminal defense attorneys. His consummate skills have led to his being listed in *The Best Lawyers in America* continuously since 1989. He was named "Criminal Defense Lawyer of 1999" by the State Bar of Texas.

Mr. Goldstein, admitted to the Bar in 1968, has also earned an illustrious reputation, including having been named "Outstanding Criminal Defense Attorney" in 1991 by the State Bar of Texas. He is past president both of the Texas Criminal Defense Lawyers Association and of the National Association of Criminal Defense Lawyers. He has taught law in at least two Texas law schools, and has lectured at numerous criminal law institutes.

The Sixth Amendment of the United States Constitution guarantees criminal defendants "a fair trial by a panel of impartial, `indifferent' jurors"; it does not guarantee a jury made up of jurors who are "totally ignorant of the facts and issues involved." *Irvin v. Dowd*, 81 S. Ct. 1639, 1642 (1961). Rather, for purposes of the Sixth Amendment, "[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.* at 1643.

Pretrial publicity may affect a defendant's ability to obtain a fair trial by a panel of impartial, indifferent jurors.[3/]

[3/] Pretrial publicity has been found to affect a defendant's right to a fair trial by an impartial jury where: (1) there is "actual identifiable prejudice attributable to the publicity in question on the part of a member of the jury which decided [the] case"; (2) "prejudicial, inflammatory publicity about [the] case so saturated the community from which [the] jury was drawn as to render it virtually impossible to obtain an impartial jury"; and (3) the pretrial publicity raised `a significant possibility of prejudice' and the Court's voir dire proceedings did not reasonably assure that prejudice would be discovered. *United States v. Chagra*, 669 F.2d 241, 249-50 (5th Cir.), *cert. denied*, 103 S. Ct. 102 (1982), and *overruled on other grounds* in *Garrett v. United States*, 105 S. Ct. 2407 (1985). Abrego does not assert that pretrial publicity affected any particular, identified member of the jury who decided his case. Nor does Abrego fault the careful voir dire procedure employed by the Court at his counsel's behest to probe thoroughly for any prejudice resulting from pretrial publicity. Abrego's only claim is that the pretrial publicity surrounding his case was so inflammatory and pervasive that the jury panel was presumptively prejudiced against him.

Where the pretrial publicity is prejudicial, inflammatory, and has saturated the community in which a defendant is to be tried, a presumption arises that it is "virtually impossible to obtain an impartial jury." *United States v. Smith-Bowman*, 76 F.3d 634, 637 (5th Cir.) (quoting *United States v. Parker*, 877 F.2d 327 (5th Cir.), *cert. denied*, 110 S. Ct. 199 (1989)), *cert. denied*, 116 S. Ct. 2537 (1996). Such a presumption, if not rebutted by the prosecution, will warrant a change of venue. *United States v. Parker*, 877 F.2d 327, 330-31 (5th Cir.), *cert. denied*, 110 S. Ct. 199 (1989)

Here, as proof of the presumptively prejudicial pretrial publicity that Abrego claims affected his right to an impartial jury and would have supported a change of venue, Abrego has submitted nineteen articles from the *Houston Chronicle* and one article from the *Wall Street Journal*.[4/] In addition, he points to numerous responses from potential jurors who stated during voir dire that they had heard about the case from radio or television reports. These submissions do not support the conclusion that pretrial publicity about Abrego's case so saturated the community that it is to be presumed that an impartial jury could not be found in the thirteen county area that comprises the Houston Division of this Court. Moreover, even if Abrego's submissions were sufficient to raise such a presumption, the Government, by reference to

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[4/] Most of the *Houston Chronicle* articles were published more than half a year *before* the trial began, and only four of the articles were published during the fortnight before trial including one on opening day.

the voir dire record, as discussed below, has successfully rebutted the presumption.

The record shows that the pretrial publicity on Abrego's case did not "saturate" the community with sensational and inflammatory publicity such that it could be presumed that an impartial jury could not be found in this District. As set forth in more detail below, nearly half (48) of the 100 members of the jury panel did not recall having seen or read any pretrial publicity. Only 21 of the 100 prospective jurors had any specific recollection of the details of any pretrial publicity, and only nine prospective jurors were required to be stricken for cause related to the pretrial publicity. The publicity cannot be said to have "saturated" the community. *See Spivey v. Head*, 207 F.3d 1263, 1271 (11th Cir.) (where "many of the prospective jurors had not heard anything about the case and most remembered very little, if anything, about it" and where only six of the potential jurors out of a panel of 70 were stricken for reasons related to pretrial publicity, the community was not "saturated" with pretrial publicity), *cert. denied*, 121 S. Ct. 660 (2000); *Jenkins v. Byrd*, 103 F. Supp.2d 1350, 1380 (S.D. Ga. 2000) (there was strong evidence of the absence of community bias related to pretrial publicity where 12 potential jurors out of a panel of 104 "were excused for some form of bias that might be traced to pretrial publicity"), *affirmed*, 273 F.3d 397 (11th Cir. 2001); compare Irvin, 81 S. Ct. at 1645 (vacating conviction and death sentence where "[t]wo-thirds of the jurors had an opinion that petitioner was guilty and were familiar with the material facts and circumstances involved").

The record further reflects that Abrego's counsel and the Court took all reasonable measures to ensure that none of the

pretrial publicity affected Abrego's right to an impartial jury. Long before trial, Abrego's counsel filed a Motion and later a Corrected Motion for Additional Specific Voir Dire Questions to Jury Panel (Document Nos. 143 and 176). Abrego requested that all prospective jurors be questioned about whether they had "read, heard or seen or [had] knowledge of any publicity regarding JUAN GARCIA-ABREGO." (Document No. 176 at 1). For those who had read or had knowledge of any publicity surrounding the case, the motion further requested that each prospective juror be separately questioned about: (1) the information he or she had obtained about Abrego, the facts of the case, and the source of their information; (2) the number of times he or she had read about the case in the newspaper or other periodical, the number of times he or she had heard about it on the radio, and the number of times he or she had heard about it on television; (3) his or her opinion as to the truth of the information obtained from the media publicity; (4) the extent to which he or she could render a fair and impartial verdict given his or her exposure to pretrial publicity; (5) whether he or she had arrived at an opinion about Abrego's guilt or innocence; and (6) whether he or she had formed any opinion about Abrego that would make it difficult to sit impartially in judgment on Abrego. (Document No. 176 at 2).

In accord with Abrego's request, the Court's first inquiry at voir dire was about the panel members' exposure to pretrial publicity:

> But first, before going further, ladies and gentlemen, based simply upon what I have said to you about the name of the defendant and the charges that are made

> here, let me simply ask if, by chance, is there any member of the panel who happens to know anything about the facts in this case or the allegations in this case? And then, also, whether there are members of the panel who have read or heard or seen anything or any publicity regarding this case or the defendant Juan Garcia through the media? In other words, matters that you either may have knowledge about or matters that you have to have read, seen or heard through the media? If so, if there are members of the panel that have such knowledge or have read, heard or seen anything about the case or this defendant, I want you to raise your hand now, please.

Transcript, Vol. 1 (Document No. 427) at 7-8. The record shows that fifty-two of the one hundred prospective jurors responded affirmatively to the Court's inquiry about pretrial media publicity surrounding the case (prospective juror nos. 1, 3, 4, 5, 9, 10, 11, 12, 16, 17, 19, 22, 23, 24, 26, 27, 29, 32, 33, 36, 37, 40, 41, 42, 44, 45, 46, 47, 49, 51, 55, 56, 57, 61, 63, 68, 69, 70, 73, 74, 75, 78, 79, 80, 81, 82, 86, 89, 90, 91, 93, and 96). *Id.* at 7-11. The Court addressed open ended follow-up questions individually to each of these panel members, all outside of the hearing of other panel members. Of those fifty-two prospective jurors, twenty-one stated in response to individualized questions that the publicity about the case they had seen, heard, or read had been brief, or that they remembered few if any details about the coverage (prospective jurors 4, 5, 11, 12, 19, 22, 24, 27, 32, 40, 41, 57, 61, 63, 68, 69, 73, 74, 81, 90, and 96). Transcript, Vol. 1 (Document No. 427) at 66-71; 71-72; 84-91; 91-95; 103-109; 110-112; 117-121; 130-132; 141-142; 157-158; 159-161; 208-212; 216-217; 217-220; 220-222; 222-225;

227-230; 230-235; 255-259; Transcript, Vol. 2 (Document No. 428) at 31-37; 43-45. Another twenty-one stated that while they had seen, heard, or read about the case and remembered some of the details regarding Abrego's arrest, the nature of the charges and allegations against him, or the circumstances regarding his confession, they could and would disregard what they had seen, heard, or read about the case (prospective jurors 9, 10, 17, 29, 33, 36, 37, 42, 45, 46, 47, 49, 51, 56, 70, 78, 79, 80, 82, 89, and 93). Transcript, Vol. 1 (Document No. 427) at 78-81; 82-84; 100-103; 135-140; 142-144; 145-149; 149-153; 161-166; 173-176; 176-181; 184-190; 191-196; 196-200; 205-208; 225-227; 242-246; 246-252; 252-255; Transcript, Vol. 2 (Document No. 428) at 2-7; 27-31; 40-43. Nine prospective jurors were struck for cause on the basis of their responses to inquiries about pretrial publicity, which suggested that they could not set aside the information or opinions they had gained from pretrial publicity (prospective juror nos. 1, 3, 16, 23, 26, 44, 75, 86, and 91). Transcript, Vol. 1 (Document No. 427) at 52-57; 60-65; 96-99; 112-116; 127-129; 166-173; 235-238; Transcript, Vol. 2 (Document No. 428) at 14-18; 37-40. Another five were struck for reasons unrelated to pretrial publicity (prospective jurors 49, 55, 74, 81, 89). Transcript, Vol. 1 (Document No. 427) at 191-196; 201-204; 230-235; 255-259; Transcript, Vol. 2 (Document No. 428) at 27-31.[5/]

[5/] The record also shows that the pretrial publicity which could be considered "inflammatory," including, (1) speculation that Abrego was responsible for multiple murders, and (2) high level bribery and corruption of Mexican governmental and law enforcement officials, was mentioned by only a few of the prospective jurors. The most often mentioned aspect of the pretrial publicity was the press's characterization of Abrego as a "drug

Based on this voir dire record and the unequivocal responses of those prospective jurors who were chosen to sit as jurors that they could and would disregard any pretrial publicity about the case they had seen, heard, or read, and decide the case solely upon the evidence admitted at trial, Abrego's counsel had no basis for seeking a change of venue. Moreover, the precise steps Abrego's counsel took in preparation for jury voir dire, namely, to request that prospective jurors be examined separately and individually about their acquaintance with pretrial publicity and their opinions regarding the case, and to suggest specific open-ended questions for those examinations, was a reasonable strategy for determining the extent to which the community in general, and the jury panel in particular, had been affected by pretrial publicity surrounding the case. *See e.g., Sharp v. Johnson*,107 F.3d 282, 286-87 (5th Cir. 1997) (holding that counsel, who did not seek a change of venue on the basis of prejudicial pretrial publicity, was not ineffective where he closely questioned prospective jurors about their opinions and their ability to act as impartial jurors) ; *see also* Parker, 877 F.2d at 331 (holding that the trial court did not err in refusing to transfer venue or utilize method of voir dire requested by the defendant where the court utilized a method

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lord" or a "drug kingpin." Such a characterization, by itself, was not so inherently inflammatory or prejudicial as to justify a presumption of prejudice *See e.g. United States v. Ayala-Martinez*, 24 F. Supp.2d 165, 168 (D.P.R. 1998) (media references to the defendant as the "head of a drug empire," a "notorious drug baroness," a "crime figure," a "mafia boss," and a "leader of the . . . underworld" were not so inherently inflammatory and prejudicial to justify a presumption of prejudice).

of conducting voir dire which reasonably assured that any prejudice on the part of prospective jurors would be discovered). Counsel's strategy for dealing with pretrial publicity was both reasonable and effective. Moreover, because the jurors who were selected to serve on the jury made commitments to decide the case based only on the evidence received at trial and to disregard any pretrial publicity to which they had been exposed, and because the trial court independently determined from its close questioning of the jurors who were accepted that they each could set aside any opinion or impression gained from the publicity, *see United States v. Davis*, 583 F.2d 190, 196-197 (5th Cir. 1978), Abrego was not prejudiced by his counsel's reasoned decision not to seek a change of venue. Under *Strickland*, Abrego's counsel was not ineffective for not seeking a change of venue.

B. Participation in Voir Dire Bench Conferences

Abrego next faults his counsel for failing to ensure that he could participate in the bench conferences that occurred during voir dire. According to Abrego, the bench conferences were not translated into Spanish for him, and he therefore could not meaningfully participate in that aspect of his trial. Although Abrego admits that his trial counsel advised the Court that the bench conferences were not being translated, Abrego contends that his trial counsel did not do enough to ensure that the bench conferences were thereafter translated for him.

As a matter of constitutional law, a criminal defendant has the right to be present in the courtroom at every stage of his trial. *Illinois v. Allen*, 90 S. Ct. 1057, 1058 (1970) ("One

of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial."); *United States v. Gagnon*, 105 S. Ct. 1482, 1484 (1985) ("[A] defendant has a due process right to be present at a proceeding `whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge. . . . [T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only'") (quoting *Snyder v. Massachusetts*, 54 S. Ct. 330 (1934)). Rule 43 of the Federal Rules of Criminal Procedure, which codified and broadened that right, provides that a criminal defendant is entitled to be present "at every stage of the trial including the impaneling of the jury." FED. R. CRIM. P. 43 (a) .

The record of the voir dire proceedings shows that Mr. Canales informed the Court that the bench conferences during jury voir dire were not being translated for Abrego. The following discourse took place on the record:

> MR. CANALES: Before he [prospective juror 47] comes over, Judge, and real quick like, the interpreter -- this interpreter has been working, the other interpreter has not been working. I am not complaining about anything. I would like for the Court to perhaps instruct the interpreters to try to do the best to interpret the proceedings for my client, Your Honor.

THE COURT: Absolutely.

MR. CANALES: It hasn't been done. I am not complaining about it.

THE COURT: Let me have both interpreters come forward. Mr. Canales says one interpreter has been working, one interpreter has not been. He wants to be sure that the proceedings are being -- while he has not complained at this point, he wants to make sure that the proceedings are being interpreted to the defendant. Is that being done?
INTERPRETER DONATI: We are doing that, yes, but not the bench conference. We've never done that.

THE COURT: You did not mean the bench conference, did you?

MR. CANALES: When we bring the jurors up here and we talk to the jurors, those are not being interpreted.

MR. RODRIGUEZ: We don't do it with English speaking defendants when we have a bench conference.

THE COURT: No, we never do.

MR. CANALES: If he can stay pretty close up here, maybe he can do it, Your Honor. My understanding is the bench conference, we are talking about it but here we are interrogating a prospective juror. That is more than a bench conference.

THE COURT: No, no, no. On these questions of the jurors, this is for purposes of voir dire on matters that you have moved they be examined on in privy.

MR. CANALES: Yes, sir.

THE COURT: And I am doing that. Now, it is true that we do not bring the criminal defendants up for this purpose to the bench so that they can hear this, whether they speak English or don't speak English.

MR. CANALES: I am very pleased the way the Court is conducting the inquiry, Your Honor. I am not complaining about that at all. I would like to have the interpreter stay up here close by so he can be able to translate for my client. That is all I am asking for. Now, if it can be done - -

THE COURT: Well, can it be done if one of the interpreters stands up here, can you use your microphone to interpret so he can hear through the earphones?

INTERPRETER DONATI: It can be done it. It is difficult because of the low volume of the conversation and also it may disrupt the court reporter. Ideally if we could have a microphone here, that would work. If you have one available.

THE COURT: I don't have a microphone here except when they broadcast the entire panel.

MR. CANALES: Well, let's proceed, Your Honor.

THE COURT: Well, are you satisfied to proceed in the way we have?

MR. CANALES: Well, I am very satisfied the way the Court is proceeding. During the break, my client inquired of me what was happening and I explained to him what was happening and I said, what is the problem, can't you hear the interpreter? He said, no, the interpreter is not on. That is why I

> bring the issue to the Court. I want to be sure, Judge, I am not complaining. But if it can be done, let's do it.
>
> THE COURT: Well, let's see if it can be done. I am happy for him to hear. All right, let's proceed.

Transcript Vol. 1 (Document No. 427) at 182-184. The Court's desire for Abrego to hear the bench voir dire and the Court's request to the interpreter to see if it could be done, evidences that Abrego's request was granted and that Abrego was thereafter permitted to hear the remaining bench voir dire conferences. The Court's personal recollection is not inconsistent with this inference. Abrego's claim to the contrary, that the interpreter did not comply with the Court's instruction and that his attorneys were ineffective for failing to make sure that the voir dire bench conferences were translated for him, is refuted by the record.

At the conclusion of the first day of jury voir dire, Assistant United States Attorney ("AUSA") Rodriguez asked that the notes Abrego had been making during voir dire be collected and confined to the courtroom as was being done with the attorneys' notes.

> MR. RODRIGUEZ: Since the Court is asking for our personal notes also not leaving the courtroom, Mr. Abrego had been making notes during the interpretation [interrogation] of people. I want to make sure the Court gets that also.

THE COURT: Yes, all right.

Transcript, Vol. 1 (Document No. 427) at 264. This direct reference to Abrego taking notes during the voir dire proceedings confirms that Abrego was privy to the voir dire bench conferences after the interpreter was asked to interpret them.

AUSA Rodriguez on the second day of testimony made another reference regarding the interpreter being at the bench during bench conferences. The Court interpreter during the presentation of evidence had continued to translate for Abrego what was being said at bench conferences attended only by the lawyers. The AUSA expressed concern about this perpetuation of the practice that had begun with jury voir dire bench conferences:

> MR. RODRIGUEZ: Your Honor, while we are here [at the bench], can I make one comment if I may? I know the Court has ruled that the interpreter can be up here and I am just going to lodge an objection because no other defendant gets that privilege and there may be matters that are sensitive that the defendant should not be privy to.
>
> THE COURT: Well, I don't know what those could be. But ordinarily, one doesn't have a microphone and the ability to have a bench conference reported to the testimony in the

> courtroom. As it happens since there is an interpreter, they have a microphone and it is possible. Maybe it ought to be done in other cases, I don't know. It permits the defendant to hear the proceedings. Now, if it becomes too distracting, we don't do it if the interpretation interferes with anything. But I don't want to have bench conferences anyway as a rule.

Transcript, Vol. 3 (Document No. 312) at 165. This record makes plain that the voir dire bench conferences were in fact interpreted for Abrego after a request was first made for such interpretation, and that the interpreter's practice adopted during jury voir dire continued even with attorney bench conferences during the presentation of the evidence. Based on this record, and the absence of any evidence from Abrego that subsequent jury voir dire bench conferences were not translated for him, Abrego's counsel was not deficient. Moreover, Abrego was not prejudiced by any of his counsel's conduct during voir dire examination.

In addition, a violation of a defendant's right to be present at all stages of his trial is subject to harmless error. *United States v. Allen*,76 F.3d 1348, 1371 (5th Cir.), *cert. denied*, 117 S. Ct. 121 (1996); *United States v. Gibbs*, 182 F.3d 408, 436-38 (6th Cir.), *cert. denied*, 120 S. Ct. S92 (1999). Unless a defendant's absence from certain stages of his trial either (1) allows the jury to "draw an adverse inference" from the absence or (2) interferes with the defendant's ability to aid in the "effective advocacy" of his case, such absence will not be said to prejudice the defendant

and any error associated with his absence will be found harmless. *Allen*, 76 F.3d at 1371.

In this case, Abrego's request for interpretation of the jury voir dire at the bench was granted. The initial part of the voir dire, before Abrego requested interpretation, was not error, but if error, was harmless. *See Kilmartin v. Dormire*, 161 F.3d 1125, 1127 (11th Cir. 1998) (defendant's exclusion from voir dire bench conferences did not violate defendant's constitutional right to be present where defense counsel attended bench conference and defendant "voiced neither a desire to be present nor an objection to his absence"), *cert. denied*, 119 S. Ct. 2035 (1999); *United States v. Cuchet*, 197 F.3d 1318, 1320-21 (11th Cir. 1999) (defendant's exclusion from voir dire bench conferences was harmless where defense counsel was present at bench conference, defense counsel was allowed to question prospective jurors at the bench, and defense counsel was given an opportunity to review his notes from the bench conferences and confer with the defendant prior to exercising peremptory strikes). Abrego was present in the courtroom throughout the jury voir dire, including the voir dire bench conferences. Moreover, while information gained during the voir dire bench conferences may have provided a basis for the exercise of peremptory strikes, the record shows that the Court gave both sides considerable time to make their strikes. *See* Voir Dire Transcript, Vol. 2 (Document No. 428) at 129-132. Abrego therefore had ample opportunity to confer with his counsel, learn what had occurred in the earlier voir dire, and participate in the use of his peremptory strikes. Abrego was not prejudiced by any exclusion from the voir dire bench conferences, and under either a harmless error standard or under *Strickland's* prejudice prong, no relief is available on

this ineffective assistance of trial counsel claim. *See United States v. Rolle*, 204 F.3d 133, 139-141 (4th Cir. 2000) (although defendant's absence from an in-chambers, individual voir dire of prospective jurors violated his right to be present at all stages of his trial, his absence did not constitute reversible error because he did not establish that his absence prejudiced him).[6/]

Likewise, no relief is available on Abrego's related claim that his appellate counsel was ineffective for not raising the same point on appeal. Appellate "[c]ounsel is not required to urge on appeal every nonfrivolous ground that might be raised. It is not only reasonable but effective for counsel on appeal to winnow out weaker arguments and focus on a few key issues." *Mayo v. Lynaugh*, 882 F.2d 134, 139 (5th Cir. 1989), *cert. denied*, 112 S. Ct. 272 (1991); *see also Ellis v.*

[6/] In reliance upon *United States v. Alikpo*, 944 F.2d 206 (5th Cir. 1991), Abrego argues that his exclusion from the voir dire bench conferences was per se prejudicial. In *Alikpo*, the defendant was not physically present in the courtroom at the time voir dire began. On appeal, Alikpo argued that the trial court erred by commencing the trial in his absence. The Fifth Circuit, while recognizing that a defendant's right to be present may be waived, and recognizing that a defendant's absence may constitute harmless error, concluded that Alikpo's physical absence may have caused the potential jurors to be biased against him: "It does not stretch the limits of credulity to envision a juror being adversely affected, consciously or unconsciously, by an accused heroin smuggler cavalierly walking in late for his trial." *Id.* at 210. Here, unlike in *Alikpo*, Abrego was physically present in the courtroom throughout the entire voir dire, including the voir dire bench conferences.

Lynaugh, 873 F.2d 830, 840 (5th Cir.), *cert. denied*, 110 S. Ct. 419 (1989). "[O]nly when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986) (cited with approval in *Smith v. Robbins*, 120 S. Ct. 746, 765 (2000)).

The record evidences that the voir dire bench conferences were translated for Abrego after Abrego requested to hear the conferences. On such a record, it would have been difficult credibly to argue that Abrego was excluded from the voir dire bench conferences. Given the absence of a record to support Abrego's claim on this issue, it was not unreasonable for appellate counsel to reject this claim in favor of other appellate issues that arguably had more merit. Appellate counsel was not ineffective for failing to raise on appeal Abrego's alleged exclusion from the voir dire bench conferences.

C. Compel Information about Cooperating Witnesses

Abrego's next ineffectiveness claim is that his counsel failed to compel information from the Government about its cooperating witnesses. According to Abrego, his counsel should have sought from the Government, as to each cooperating witness: (1) any initial discussions between the Government and counsel for the cooperating witness regarding the information expected from the cooperating witness; (2) any initial discussions between the Government and counsel for the cooperating witnesses regarding the benefits available to such cooperating witness; (3) the actual proffer by the cooperating witness and any statements from his counsel; (4) any initial discussions between the

prosecutor and the case agent reflecting an assessment of the completeness and truthfulness of the cooperating witness's proffer; (5) any subsequent discussions between the prosecutor and counsel for the cooperating witness regarding any additional information to be provided; and (6) any subsequent discussions regarding the extent of benefits to be offered to the cooperating witness as well as the actual benefits ultimately offered.

Prior to trial, Abrego's counsel filed a Motion for Discovery and Inspection and a Corrected Motion for Discovery and Inspection (Document Nos. 112 & 173). As is relevant to this claim of ineffective assistance of counsel, Abrego's counsel sought in that motion:

- the "substance of any statement attributed to any un-indicted co-Defendant"

- the "substance of any hearsay statements the Government intends to offer under Rules 803(24) or 804(b)(5) of the Federal Rules of Evidence"

- "the substance of any and all statements which the Government alleges are admissible as statements of a co-conspirator made during the course and in furtherance of the conspiracy"

- "the names and addresses of persons who have knowledge pertaining to this case or who have been contacted by the Government or their agents in connection with this case"

- "statements of Government witnesses"

- "any and all criminal arrest and conviction records of all persons . . . the Government plans to call as witnesses"

- "written statements of all persons . . . who the Government does not plan to call as witnesses"

- "the name, identity and whereabouts of any informer who gave information leading to Defendant's abduction, arrest or indictment"

- "any and all material known to the Government or which may become known, or which through due diligence may be learned from the investigating officers or the witnesses or persons having knowledge of this case, which is exculpatory in nature or favorable to the accused or which may lead to exculpatory or favorable material or which might serve to mitigate punishment, including any evidence impeaching or contradicting testimony of Government witnesses in this cause (i.e. prior convictions or prior inconsistent statements or identifications made by Government witnesses in this cause), or instructions to Government witnesses not to speak with or discuss the facts of the case with defense counsel"

- "notice of any pending charges, indictments, probation, parole, the existence of offenses known to the Government for which the witness has not been charged, as well as the substance of any and all statements or discussions had with any alleged co-Defendants (charged or uncharged) herein or with any such person's counsel indicating a promise or a suggestion of leniency, compensation, assurance not to prosecute, agreement to

proceed on only certain counts of an indictment, representations with respect to yet uncharged misconduct, or any benefit accruing to said individuals whatsoever in exchange for their cooperation, assistance or testimony at the trial herein, as well as any probations, paroles, pending charges or other offenses known to the Government which have not been charged, or any hope that a Government witness may have for any benefit whatsoever as same relate to a Government witness' motive for testifying on their behalf".

- "any and all impeachment matter "

(Document No. 173). These discovery requests encompass, in some form or another, all of the information Abrego now claims his counsel should have moved to compel from the Government. The Government was also obliged under Brady v. Maryland, 83 S. Ct. 1194 (1963), to provide Abrego with any exculpatory evidence in its possession.

Defendant's Motion for Discovery and Inspection was considered at a pretrial conference held on September 3, 1996, less than two weeks before trial. Abrego's counsel stated that he was satisfied, for the most part, with the Government's production. Pretrial Hearing (Document No. 322) at 4. The only deficiency about which defense counsel complained was the Government's refusal to produce those portions of FBI Form 302 reports of investigation, and comparable DEA reports of investigation, in which witnesses interviewed by the FBI or DEA were recorded as having attributed certain statements to Defendant-Petitioner Abrego. These were not statements made to the federal agents by Abrego himself. The Court held that those portions of the

investigatory reports were not discoverable on the theory argued by Abrego, and therefore that particular request contained in Abrego's Corrected Motion for Discovery and Inspection was denied. *Id.* at 147. The remainder of the discovery requested in Defendant's Corrected Motion for Discovery and Inspection was unopposed by the Government, and fell within its obligations under Rule 16, Rule 26.2, the Jencks Act, *Brady v. Maryland*, *Giglio v. United States*, the rules of criminal procedure, and applicable case law. The Government represented in open Court that it had already complied. *Id.* at 147-48.

Upon this record Abrego's counsel had no basis for filing a motion to compel, and counsel was therefore not deficient for failing to do so.[7] Moreover, Abrego has made no showing that he would have gained any information through a motion to compel that would have changed the outcome of his trial, and therefore, Abrego was not prejudiced by his

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[7] Much of the information Abrego now believes his counsel should have moved to compel necessarily included nondiscoverable attorney client and work product materials. *See United States v. Mann*, 61 F.3d 326, 331 (5th Cir. 1995) (work product privilege applicable to criminal cases); FED. R. CRIM. P. 16 (a) (2) ("Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case. Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

counsel's not filing a motion to compel. Under *Strickland*, this ineffectiveness claim also fails.

D. Objections/Motions to Strike

Abrego's next ineffectiveness claim is that there were fifty-one instances during the course of this rather lengthy trial in which his trial counsel should have objected to the admissibility of certain evidence or testimony, should have moved to strike certain evidence or testimony, or erred by soliciting damaging testimony on cross-examination."A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness." *Green v. Johnson*, 116 F.3d 1115, 1122 (5th Cir. 1997) (quoting Garland v. Maggio, 717 F.2d 199, 206 (5th Cir. 1983)). It was evident at trial and, of course, from the record, that the strategy of Abrego's counsel was: (1) to challenge vigorously the credibility of the Government's cooperating witnesses; (2) to emphasize that the only witnesses who identified Abrego as the leader of the drug and money laundering conspiracy were criminals themselves who were furthering their own interests by testifying at trial and who therefore should not be believed; and (3) to raise reasonable doubts that Abrego was in fact "El Senor," the leader of the drug and money laundering conspiracy. It was an appropriate and plausible strategy and, given the Government's strong case, a better defense strategy was probably nonexistent. It is in the total context of this case that the Court has reviewed the fifty-one instances that Abrego has combed from this lengthy trial, and none of these instances separately or collectively implicates Abrego's Sixth Amendment right to counsel.

In six of the fifty-one instances, Abrego has not stated what objection he believes his counsel should have made. In thirteen instances Abrego claims that his counsel should have objected on the lack of foundation; in two instances his counsel should have objected on the basis of lack of foundation and speculation; in one instance his counsel should have objected to the leading nature of the prosecutor's question and the lack of foundation for the witness's answer; and in one instance his counsel should have objected to a prosecutor's question as leading and argumentative; but in none of these instances has Abrego made a showing or even argued that such objections, if made, and if arguably meritorious, could not have been overcome by the prosecutor asking further questions to establish a foundation, or by rephrasing the question. Likewise, Abrego claims that in four instances the prosecutor improperly vouched for a witness and in one instance his counsel could have objected to a witness's testimony on the ground that it was nonresponsive, but Abrego has made no showing that these objections if made would have been sustained, or that the alleged "vouching" was improper. *See e.g. United States v. Wallace*, 32 F.3d 921, 926 (5th Cir. 1994) (prosecution can elicit favorable terms of an agreement with a witness without improperly vouching for the credibility of the witness). Abrego claims in seven instances that his counsel should have objected to testimony as hearsay, and in five instances that his counsel should have objected to testimony as hearsay and without proper foundation, but Abrego has made no showing and offered no argument that (1) the testimony that he now claims was hearsay was in fact hearsay rather than a nonhearsay co-conspirator statement, FED. R. EVID. 801 (d) (2) (E) , (2) that the testimony did not fall within one of the hearsay exceptions, and (3) that the foundation objection

could not have been overcome by the Government. Abrego claims that in two instances his counsel should have objected to testimony under FED. R. EVID. 403, as more prejudicial than probative, and in two instances that his counsel should have objected to testimony under FED. R. EVID. 404(b), but these objections, if made, when considered in context of the record and controlling law, would not likely have been sustained. The Fifth Circuit Court of Appeals held on Abrego's direct appeal that the admission of testimony regarding murders related to the drug and money laundering conspiracy was not error. *Abrego*, 141 F.3d at 174-176; see also *United States v. Garza*, 118 F.3d 278, 285 (5th Cir. 1997) (evidence of guns and other weapons, tools of the drug trafficking trade, are admissible), *cert. denied sub. nom. Innocenio v. United States*, 118 S. Ct. 699 (1998). Abrego claims in four instances that his counsel should have moved to strike certain testimony after an objection by his counsel to the prosecutor's question had been sustained, but these would have been inconsequential: In two of the four instances the record shows that after counsel's objection to the prosecutor's question was sustained, the witness did not answer the objectionable question and therefore there was no testimony to strike. In the other two instances, after defense counsel's objections were sustained the prosecutor rephrased the question to overcome the objection and successfully elicited essentially the same answers by asking non-objectionable questions. Abrego claims his counsel should have objected to one "speaking objection" made by the prosecutor, but the record shows that the prosecutor's comments, which were merely an explanation of her objections to defense counsel's mischaracterization of the reward offered for information leading to Abrego's arrest, were not clearly objectionable. Finally, Abrego claims that

in two instances his counsel elicited harmful information from Government witnesses on cross-examination, but Abrego has made no showing that his counsel could reasonably have anticipated the harmful testimony, or that such testimony had any effect on the outcome of the trial. Two isolated instances of harmful testimony being inadvertently elicited on cross-examination, over the course of a long trial such as this, evidences the superior performance of Abrego's defense counsel rather than a deficient performance which prejudiced Abrego within the meaning of *Strickland*.

A comprehensive review of the record, including examination of the particular, isolated deficiencies that are alleged against defense counsel in hindsight, a recognition of counsel's defense strategy, and taking into account the overwhelming evidence of Abrego's guilt,[8/] lead inevitably to the Court's conclusion that these fifty-one instances during a trial of three or four weeks' duration, did not constitute deficient performance on the part of trial counsel, and defense counsel's performance in no way prejudiced Abrego within the meaning of *Strickland*.

VI. Suppression of Evidence (Brady v. Maryland) Claim

Abrego's remaining claim is that the Government suppressed evidence of an agreement that it had with one of

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[8/] See Appendix A to United States's Memorandum in Support of its Answer to Motion for New Trial and to § 2255 Motion and its Request for Rule 8(a) Determination (Document No. 443), and its detailed summary of the evidence.

its numerous witnesses, Carlos Resendez. Abrego alleges that the Government had agreed to pay Resendez in exchange for his testimony $2 million (a sum that the Government offered for the capture and arrest of Abrego), and other financial and personal incentives, and that these arrangements were not disclosed at trial. In addition, Abrego contends that Resendez testified falsely about his role in the apprehension of Abrego, and about the agreement he reached with the Government relative to the reward money and other agreed upon incentives he was to receive in exchange for his testimony, and that the Government knowingly presented that false testimony from Carlos Resendez.

In an Order entered on December 14, 2000 (Document No. 450), this Court gave notice to the parties that this issue would be considered within the context of FED. R. CIV. P. 56, which provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). *See* Rule 12, Rules Governing Section 2255 Proceedings. Both sides were given an opportunity to submit additional summary judgment evidence in support of their claims and defenses. Pursuant to that Order, Petitioner has submitted two additional substantive Declarations of Manny Lopez (Document Nos. 451 & 463), an additional Declaration of Michael Pancer, Petitioner's counsel in this § 2255 proceeding (Document No. 451), a Declaration of Silvia Raquenel Villanueva Frausto, translated from Spanish to English (Document No. 452), and an unsigned "Declaration" purportedly reviewed and approved by Carlos Resendez

(Document No. 463), the Government witness whose trial testimony is the subject of Petitioner's suppressed evidence and perjured testimony claims.

A. Admissibility of the Evidence Presented

Most of Defendant-Petitioner's submissions are not competent summary judgment evidence and cannot be considered in determining whether a genuine issue of material fact exists that would require an evidentiary hearing. In two of the three Declarations made by Manny Lopez, a private investigator employed by Defendant-Petitioner's counsel, Lopez states that Carlos Resendez told him various things at two meetings, one on August 1, 1999, in Las Vegas, Nevada, and the other on March 27, 2001, in Laredo, Texas. In the first Declaration, dated August 30, 1999, Lopez states:

> (3) I interviewed Carlos Resendez in Las Vegas, Nevada, on August 1, 1999. Mr. Resendez was interviewed in the presence of Attorney Michael Pancer.
>
> (4) Mr. Resendez stated that he had been a witness at the trial of Juan Garcia-Abrego in Houston, Texas, in 1996. Mr. Resendez said that prior to his testimony at the trial of Juan Garcia-Abrego, he had worked out an arrangement with the Assistant United States Attorney, "Melissa," who was prosecuting Juan Garcia-Abrego, and with the Federal Bureau of Investigation Agent in Charge of the Houston, Texas office, Peter Hanna.

(5) Mr. Resendez stated that the arrangement between him, AUSA "Melissa," and FBI Agent Peter Hanna, was as follows:

(A) Resendez would receive the $2,000,000.00 (US currency) reward that the United States government had offered for Juan Garcia-Abrego.

(B) The United States government would purchase all of Resendez' property in Mexico.

(C) Resendez would receive $3,000.00 (US currency) per month for expenses until he received the $2,000,000.00 (US currency) reward money.

(D) United States government federal agents would provide personal protection for Resendez and he would be provided a new identity.

(E) Resendez and his family would be offered United States citizenship.

(F) The United States government would buy Resendez a house.

(G) The United States government would buy Resendez a farm.

(H) The United States government would provide a job for Resendez.

(6) Resendez said that AUSA "Melissa" ordered him to lie under oath during his testimony at the trial of

Juan Garcia-Abrego. Resendez stated that several days before he was to provide testimony at Juan Garcia-Abrego's trial, AUSA "Melissa" interviewed him for hours. Resendez said that AUSA "Melissa" directed him to testify, while under oath, that he was the person responsible for the capture of Juan Garcia-Abrego by Mexican authorities. Resendez said that AUSA "Melissa" was aware that he (Resendez) was not the person responsible for the capture of Juan Garcia-Abrego. Resendez said that his former mistress, Noema Quintanilla, was the person responsible for the capture of Juan Garcia-Abrego, and that Quintanilla had already received a $1,000,000.00 (US currency) reward offered by the Mexican government for the capture of Juan Garcia-Abrego. Resendez said that AUSA "Melissa" had met Quintanilla in Houston, Texas on several occasions and was fully aware that she (Quintanilla) was the person responsible for the capture of Juan GarciaAbrego. Resendez said that he told AUSA "Melissa" that what she was ordering him to do was not the truth and that he would not lie under oath. Resendez said that AUSA "Melissa" threatened him by stating that charges could be filed against him in the Juan Garcia-Abrego matter.

(7) Resendez said that AUSA "Melissa" ordered him to lie under oath during his testimony at the trial of Juan Garcia-Abrego. Resendez stated that AUSA "Melissa" told him that defense Attorney Tony Canales, was going to ask him if he had ever discussed the $2,000,000.00 reward offered by the United States government. Resendez said that AUSA

"Melissa" told him to say that he had never discussed the reward money with her or any federal agents. Resendez said that he lied when asked, during his testimony under oath, that he had never discussed the reward money. Resendez said that AUSA "Melissa" had not only ordered him to lie under oath, but was present in the court room when he lied under oath.

Declaration of Manny Lopez, attached as an exhibit to Document No. 431. In the second of these Declarations, dated April 2, 2001, Lopez states:

(2) On March 27, 2001, I met with Carlos Resendez Bertolousi in Laredo, Texas.

(3) Carlos Resendez Bertolousi was shown a declaration (see attachment) that I had prepared based upon past interviews with Resendez Bertolousi in San Antonio, Texas, and Las Vegas, Nevada.

(4) Carlos Resendez Bertolousi read the prepared declaration. Carlos Resendez Bertolousi stated that the declaration was accurate with the exception of two changes, which are noted on the declaration. The changes on the declaration are both on page number one. Section (2) letter (H) "employment for me," was deleted by Carlos Resendez Bertolousi. Section (3) "1,000,000.00 (one million dollars)," was changed to "an amount."

(5) Carlos Resendez Bertolousi stated that he could not sign the declaration because he feared that he would be deported to Mexico by agents of the

United States government. He stated that agents for the United States government had warned him not to sign any declarations in support of Juan Garcia Abrego. He said that after his attorney, Raquenel Villanueva Frausto, had signed a declaration in support of the defense of Juan Garcia Abrego, the Mexican government issued an arrest warrant for him. Carlos Resendez Bertolousi feels that the Mexican government issued the arrest warrant as a result of pressure by United States government agents so that he would not sign any declarations on behalf of the defense of Juan Garcia Abrego.

(6) Carlos Resendez Bertolousi stated that if he was subpoenaed to a court hearing he would tell the truth regarding the misconduct of US Assistant Attorney General Melissa Annis during the trial of Juan Garcia Abrego as described in the attached declaration that he reviewed. He would also tell the truth regarding the promises that were made to him by agents of the United States government before he testified at the trial of Juan Garcia Abrego as described in the attached declaration that he reviewed.

(7) Carlos Resendez Bertolousi stated that an FBI agent who is very familiar with the misconduct of US Assistant Attorney General Melissa Annis, has told him that he would be willing to testify in court if subpoenaed.

(Document No. 463).

The Government correctly objects to Lopez's Declarations insofar as they recount statements purportedly made by Resendez because the content of those statements is not within Lopez's "personal knowledge" and is not competent summary judgment evidence. The Declarations are replete with inadmissible hearsay for which a hearsay exception does not apply. Under FED. R. EVID. 802, "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c). Lopez's Declarations, in which he relates what he says that he was told by Carlos Resendez, are hearsay within the meaning of FED. R. EVID. 801(c) and are inadmissible in the absence of an applicable exception under FED. R. EVID. 802.

Abrego argues that the statements attributed to Resendez in Lopez's Declarations should be admissible as statements against interest under FED. R. EVID. 804 (b) (3). FED. R. EVID. 804 (b) (3) provides:

> (b) **Hearsay exceptions**. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> > (3) **Statement against interest**. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the

> declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

A proponent of evidence that arguably falls within this exception has the burden of proving that the exception applies. *American Automotive Accessories, Inc. v. Fishman*, 175 F.3d 534, 540 (7th Cir. 1999). To meet that burden, the proponent of the evidence must show (1) that the declarant is unavailable, (2) that the statement was against the declarant's penal, pecuniary, or proprietary interest, and (3) that corroborating circumstances exist which indicate the trustworthiness of the declarant's statement. *Id.*; *United States v. Dean*, 59 F.3d 1479, 1492 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 794 (1996); *United States v. Flares*, 985 F.2d 770, 774 n.10 (5th Cir. 1993). Abrego has failed to make the showing required by FED. R. EVID. 804 (b) (3).

First, Abrego has not shown that Resendez is "unavailable." Under FED. R. EVID. 804, a declarant is unavailable when the declarant -

> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

FED. R. EVID. 804 (a). In this case, Abrego on the one hand contends that Resendez is "unavailable" because the Government pressured him not to sign a Declaration or affidavit, but then contends, in Manny Lopez's Declaration, that Resendez will freely testify if subpoenaed to a court hearing. Moreover, Abrego contends that Resendez's whereabouts are unknown and that Resendez is under the control of the Government, but then offers Declarations from

his investigator Manny Lopez who swears that he has contemporaneously located and met with Resendez on three different occasions-in Las Vegas, Laredo, and San Antonio. Resendez's Mexican attorney, Ms. Villaneuva, claims to have spoken with Resendez after the direct appeal of Abrego's conviction, and she asserted no difficulty in establishing that communication. Resendez's purported availability and willingness to testify at an evidentiary hearing are wholly inconsistent with Abrego's claim that Resendez is unavailable to provide a personal affidavit in support of Abrego's motion. Resendez's unwillingness to sign a Declaration that supports Abrego's claims, which at most is all that has been shown, does not equate to "unavailability" within the meaning of FED. R. EVID. 804.

Second, there has been no showing that the statements attributed to Resendez in Manny Lopez's Declarations are against Resendez's penal, pecuniary, or proprietary interests. Abrego presupposes that the Court will conclude that Resendez's statements are against his penal interest because he could be charged with perjury. While the purported statements of Resendez that are contained in Lopez's Declarations appear at times in conflict with Resendez's trial testimony about what he was to receive from the Government in exchange for his cooperation and testimony, a presumption is not warranted that Resendez's statements would subject him to a perjury charge for his trial testimony. To begin with, Resendez's purported statements to Lopez are not inherently inconsistent with Resendez's trial testimony that the Government had agreed to provide protection for him and his family. Transcript, Vol. 10 (Document No. 338) at 83-84, 151-152. Such protection, upon which Resendez was thoroughly cross-examined by Abrego's counsel, could

have included enrollment in the witness protection program. *Id.* at 146. Although the terms of a witness protection program are not fully disclosed in the evidence, it seems axiomatic that creating a new identity for a participant in the program would entail providing that individual with a residence, a job, and possibly even United States citizenship. Moreover, even if Resendez lied at Abrego's trial about the terms of his agreement with the Government, the truth regarding that agreement would have been known to the Government at the time. It seems highly improbable, therefore, that the Government could or would now pursue perjury charges after having not done so for a period of several years following the trial. There has been no showing that the statements attributed to Resendez were statements made against Resendez's interest.

Third, the attributed statements are not supported by corroborating evidence or circumstances. Abrego claims that proof of the two cashier's checks dated March 16, 1998,-one for $1 million payable to Resendez and the other for $250,000 payable to Noema Quintinilla Montes, Resendez's former mistress-are corroboration for Lopez's Declarations, but he fails to show that the checks prove any material portion of Lopez's Declarations. The 1998 cashier's checks are just as likely corroborative of Resendez's testimony and conduct in the 1996 trial, namely, that he knew about the offer of reward money, that at the time of trial he did not intend to apply for it, and that at the time of trial he did not disavow possibly claiming payment of the reward in the future. Apparently he did so, and evidently received $1 million, which is not surprising in view of his evident role in the capture of Abrego. In sum, the statements attributed to Resendez in the Declarations of Manny Lopez are hearsay

that do not fall within the statement against interest exception to the hearsay rule and are therefore not admissible to prove the existence of an undisclosed agreement between Resendez and the Government at the time of trial, or that Resendez, at the Government's behest, offered perjured testimony at trial. *See e.g., Goodwin v. Johnson*, 132 F.3d 162,186-88 (5th Cir. 1998) (no relief was available on petitioner's Brady claim, which was premised on the State's failure to disclose an agreement between it and one of its witnesses that could have been used to impeach the witness, where evidence of such an agreement was either nebulous or supported by an inadmissible hearsay statement).

Carlos Resendez did not sign the "Declaration" purportedly reviewed and approved by him and therefore it, too, is not competent summary judgment evidence. *Nissho-Iwai American Corp. v. Kline,* 845 F.2d 1300, 1306 (5th Cir. 1988) ("It is a settled rule in this circuit that an unsworn affidavit is incompetent to raise a fact issue precluding summary judgment.") In addition, the Declarations of Michael Pancer, which contain the same objectionable hearsay as that found in the Declarations of Manny Lopez, do not constitute competent summary judgment evidence.

The Government objects to the Declaration of Silvia Raquenel Villanueva Frausto (hereafter referred to as "Villanueva") because it is not signed under penalty of perjury, which is required to constitute competent, admissible evidence. Villanueva states in her Declaration, which was translated from Spanish to English, that:

3. I was present when federal agents of the United States government interviewed Resendez-Bertolousi. The interviews at which I was present took place-one in Mexico and the other in the United States. The interview in Mexico was taped. The interviews took place prior to the trial of Mr. Juan Garcia Abrego.

4. I was present when Resendez-Bertolousi, Assistant US Attorney "Melissa" and an agent from the FBI arrived at an agreement before Resendez-Bertolousi testified at Mr. Juan Garcia Abrego's trial. The agreement was:

a) The purchase, by the government of the United States, of Resendez-Bertolousi's properties in Mexico.

b) US citizenship for Resendez-Bertolousi and his family.

c) Change of identity and personal protection for Resendez-Bertolousi.

d) The purchase, by the government of the United States, of a house in the United States for Resendez-Bertolousi.

e) Employment in the United States for Resendez-Bertolousi.

5. Carlos Resendez Bertolousi informed me later, but prior to the trial of Juan Garcia Abrego, that the United States government promised to pay two million dollars for him to agree that he had turned in Juan Garcia Abrego,

AUSA "Melissa," Resendez-Bertolousi told me, threatened him for three days so that he would say that he was the one who was responsible for the capture of Juan Garcia Abrego or they would prosecute him with criminal charges. AUSA "Melissa," Resendez Bertolousi told me, ordered him to deny to the defense at the trial of Juan Garcia Abrego the offer of payment and information that AUSA "Melissa" had made known to him about other witnesses against Juan Garcia Abrego.

6. After the appeal presented by Juan Garcia Abrego, Resendez-Bertolousi informed me that the government of the United States paid him the amount of one million dollars.

7. I make this declaration with the authorization of my client Carlos Resendez-Bertolousi and at the request of defense counsel for Juan Garcia Abrego and for having personal knowledge of what I said.

I declare the aforementioned under oath according to the laws of the United States.

(Document No. 452). Paragraphs 3 and 4 of Villanueva's Declaration are based on Villanueva's claimed personal knowledge and presence at a meeting, and do not constitute hearsay. Paragraphs 5 and 6, however, in which Villanueva recounts what she says she was told by Carlos Resendez, contain the same type of inadmissible hearsay as in the Declarations of Manny Lopez. Moreover, although the translated version of Villanueva's Declaration does not specifically state that the Declaration was made by Villanueva subject to the penalties of perjury, that is what is implied by Villanueva's statement that the Declaration was

made "bajo juramento de las leyes de los Estados Unidos") ("under oath according to the laws of the United States"). (Document No. 452). For that reason, and the further reason that Villanueva's Declaration may have been subject to an incomplete and/or unnecessarily narrow interpretation of her statements from Spanish to English,[2/] her statements in paragraphs 3 and 4 of her Declaration will be considered as competent, admissible summary judgment evidence.

The Affidavit of Melissa Annis, the Assistant United States Attorney in charge of Petitioner's prosecution, controverts the statements made by Villanueva in paragraphs 3 and 4 of her Declaration. Ms. Annis directly refutes Villanueva's Declaration as follows:

> III. I have read the translation of the declaration of Silvia Raquenel Villanueva Frausto filed by Garcia-Abrego on the 19th of January, 2001, and state the following based upon my personal knowledge:
>
> a) Between August and September 30, 1996, I discussed with Carlos Resendez-Bertolousi, in the presence of one or more agents of the Federal Bureau of Investigation (FBI), various issues concerning Resendez' security and that of his immediate family

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[2/] Manny Lopez, in a Declaration dated February 20, 2001 (Document No. 458), states: "Mexican citizens will attest to the truthfulness of their declarations by declaring 'bajo juramento' or 'under oath' which is the equivalent of declaring under penalty of perjury."

prior to his testimony in United States v. Juan Garcia Abrego.

1) Silvia Raquenel Villanueva Frausto was not present when Carlos Resendez-Bertolousi and I "arrived at an agreement before Resendez-Bertolousi testified."

2) I did not agree or promise Carlos Resendez-Bertolousi, nor did anyone else in my presence,

A) that the United States government would purchase Resendez-Bertolousils properties in Mexico;

B) United States citizenship for Resendez-Bertolousi and his family;

C) a change of identity and personal protection for Resendez-Bertolousi;

D) that the United States government would purchase a house in the United States for Resendez-Bertolousi; or

E) employment in the United States for Resendez-Bertolousi.

3) In connection with our discussions prior to Resendez-Bertolousi's testimony concerning the dangers facing Resendez if he were to return to Mexico, I told Resendez that he was in the United States legally and that status was temporary. I explained to Resendez-Bertolousi that should he

decide that he and his family wanted to remain in the United States after the trial, he would need to make arrangements through the United States Immigration and Naturalization Service for a more permanent status. In discussing with Resendez-Bertolousi his long term housing needs, should he decide to remain in the United States, I suggested to Resendez that he consider having his grown children residing in Mexico sell his assets in Mexico and forward the proceeds to him in the United States. I also told Resendez-Bertolousi it would be necessary for him to obtain employment in the United States so he could support himself and his family if he chose to remain here. On a temporary basis, the FBI agreed to pay the rent for living accommodations for Resendez-Bertolousi and his family in Houston.

4) I explained to Resendez-Bertolousi that the "Witness Protection Program" might be an available security option but it would be the United States Attorney's decision whether Resendez-Bertolousi should be sponsored by our office for the "Witness Protection Program," should Resendez-Bertolousi even request sponsorship. I further explained that even if the United States Attorney agreed, the decision was entirely up to the United States Marshal's Service whether to accept him and his family into the "Witness Protection Program" and I could not guarantee that he would be sponsored or accepted. I described in general terms how the "Program" operated and that it involved changing his identity and that of the family members joining him in the "Program" and a commitment from each of them to have no further contact with anyone from their prior life, including family members. It was explained to Resendez-Bertolousi that if he were accepted into the "Witness Protection Program" that

he and his family would be moved by the U.S. Marshal's Service to a city or town not of Resendez-Bertolousi's choosing, and he would have to work to support his family. After Resendez-Bertolousi was informed of the strictures of the "Witness Protection Program" there was neither a request for, nor an offer of, sponsorship.

5) Based upon my personal conversations with Carlos Resendez-Bertolousi prior to his testimony, I believe that Resendez-Bertolousi testified truthfully concerning all promises and agreements made between us.

Affidavit of Melissa Annis, attached as Appendix "A" to United States' Supplemental Argument and Authority (Document No. 455).

Apart from whether Villanueva was present when Annis and Resendez reached an agreement, the conflict between Villaneuva's and Annis's testimony reflects a factual dispute on whether the Government agreed to purchase Resendez's properties in Mexico, to arrange for United States citizenship for Resendez and his family, to arrange for a change of identity and personal protection for Resendez, to purchase a house in the United States for Resendez, and to provide Resendez with employment in the United States. A factual dispute on these terms of an alleged agreement, however, will not warrant an evidentiary hearing on Petitioner's suppressed evidence and perjured testimony claims unless the fact issue is "material." "By its very terms, [Rule 56's] standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summaryjudgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct.2505, 2510 (1986) (emphasis in original) "In determining whether a

material factual dispute exists, the Court views the evidence through the prism of the controlling legal standard." *Nebraska v. Wyoming*,113 S. Ct. 1689, 1694 (1993).

B. The Standards to be Applied

1. Allegedly Suppressed Evidence

The United States Supreme Court in *Brady v. Maryland*, 83 S. Ct. 1194, 1196-97 (1963), held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." In order to prevail on a suppression of evidence claim, however, it must be shown that evidence was actually suppressed by the prosecution and that the suppressed evidence was material. *Strickler v. Greene*, 119 S. Ct. 1936, 1948 (1999) (Stevens, J.) ("There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."). Evidence of which the defendant is aware does not constitute suppressed evidence within the meaning of *Brady*. *See generally United States v. Ramirez*, 810 F.2d 1338, 1343 (5th Cir.), *cert. denied*, 108 S. Ct. 136 (1987); *United States v. Fogg*, 652 F.2d 551, 559 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1751 (1982). Evidence is material under *Brady* if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 105 S. Ct. 3375, 3383 (1985). The reasonable probability inquiry is

> not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is

> sufficient to support the jury's conclusions. Rather, the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'

Strickler, 119 S. Ct. at 1952 (quoting *Kyles v. Whitley*, 115 S. Ct. 1555, 1566 (1995)).

2. Allegedly Perjured Testimony

"[I]t is established that a conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment . . . . The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue v. Illinois*, 79 S. Ct. 1173, 1177 (1959). "[T]he Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 96 S. Ct. 2392, 2397 (1976). To be entitled to relief on a claim that the Government used perjured testimony, it must be shown (1) that the evidence presented was false; (2) that the evidence was material; and (3) that the prosecution knew that the evidence was false. *United States v. Blackburn*, 9 F.3d 353, 357 (5th Cir. 1993), *cert. denied*, 115 S. Ct. 102 (1994) ; Shaw v. Estelle, 686 F.2d 273, 275 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 1215 (1983). "Evidence is 'false' if, *inter alia*, it is 'specific misleading evidence important to the prosecution's case in chief.'" *Nobles v. Johnson*, 127 F.3d 409, 415 (5th Cir. 1997)quoting *Donnelly v. DeChristoforo*, 94 S. Ct. 1868, 1873 (1974)), *cert. denied*, 118 S. Ct. 1845 (1998). Discrepancies in testimony alone do not establish the knowing use of perjured testimony. *Valles v. Lynaugh*, 835 F.2d 126, 127 (5th Cir. 1988) "False evidence is 'material'

only 'if there is any reasonable likelihood that [it] could have affected the jury's verdict.'" *Nobles*, 127 F.3d at 415 (quoting *Westley v. Johnson*, 83 F.3d 714, 726 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 773 (1997)). Stated another way, the use of perjured testimony is material "unless failure to disclose it would be harmless beyond a reasonable doubt." *Bagley*, 105 S. Ct. at 3382 (relying on *Agurs*, 96 S. Ct. at 2397)).

3. The Standard for "Materiality"

The standard by which materiality is judged under *Brady* on a suppression of evidence claim has been developed by the Supreme Court in a succession of cases. In *Brady*, the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 83 S. Ct. at 1196-97. The Supreme Court did not enunciate in *Brady* what it meant by evidence "material" to guilt or punishment, but in *United States v. Agurs*, 96 S. Ct. 2392, 2398 (1976), it concluded that "implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." Not until the Supreme Court decided *United States v. Bagley*, 105 S. Ct. 3375, 3377 (1985) was there a definitive standard for assessing the materiality of suppressed evidence under *Brady*: "The issue in the present case concerns the standard of materiality to be applied . . . ." In *Bagley*, the Supreme Court first rejected the Government's proposition that a distinction could be drawn between impeachment evidence and exculpatory evidence. *Id.* at 3380-81. The Supreme Court then held that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* at 3383.

In *Kyles v. Whitley*, 115 S. Ct. 1555, 1565 (1995), the Supreme Court reaffirmed the materiality standard it had announced in *Bagley*, and emphasized four aspects of materiality under Bagley. First:

> a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant). *Bagley's* touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Id. at 1566 (citations and internal quotations omitted). Second, the materiality standard is not "a sufficiency of evidence test"; that is, materiality is not judged merely by determining whether there would be sufficient evidence to support the conviction if the exculpatory or impeachment evidence had been disclosed by the prosecution. *Id.* Rather, materiality is based on whether the "favorable evidence [that was suppressed] could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* Third, the Supreme Court rejected the application of harmless error review to a *Brady* claim. According to the Court, once it has been established that favorable evidence was suppressed, and that such evidence was material, the error cannot be [illegible] harmless. *Id.* at

1566-67. Finally, the Supreme Court explained that materiality must be considered from the record as a whole. *Id.* 1567-68.

Carlos Resendez was one of several of the Government's key witnesses who were able to identify Abrego as the leader of the drug and money laundering conspiracy known as the Gulf Cartel. In this proceeding, Abrego has made no claim that Resendez's trial testimony was false when he, among others, specifically identified Abrego as the leader of the drug conspiracy. Moreover, Abrego makes no claim that the Government suppressed any exculpatory evidence on any of his crimes of conviction. Abrego's specific claim, to put it in focus, is that the Government suppressed evidence of an agreement that it had made with Resendez to compensate Resendez generously for his testimony and that the Government knowingly permitted Resendez falsely to deny the existence of that agreement. In other words, Abrego complains that he was denied evidence that would have had value to him for the further impeachment of Resendez.

As observed above, impeachment evidence, as well as exculpatory evidence, falls within the *Brady* rule. *See United States v. Bagley*, 105 S. Ct. 3375, 3380 (1985); *Giglio v. United States*, 92 S. Ct. 763, 766 (1972). The Supreme Court in *Bagley* expressly rejected the Ninth Circuit's view that a failure to disclose impeachment evidence was "more egregious" than a failure to disclose exculpatory evidence. Bagley, 105 S. Ct. at 1380. There is no constitutional distinction, the Court held, between impeachment evidence and exculpatory evidence. *Id.* Suppression of evidence that might be useful for impeachment on cross-examination rises to a constitutional error "only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." *Bagley*, 105 S. Ct. at 1381.

More recently, upon review of a capital murder habeas petition where the state had suppressed evidence of at least five documents containing what the district judge termed `potentially devastating impeachment material" pertaining to the only disinterested eyewitness against the defendant, the Supreme Court found that the trial record provided strong support for the conclusion that petitioner would have been convicted of capital murder and sentenced to death even if the key eyewitness "had been severely impeached." *Strickler v. Greene*, 119 S. Ct. 1936, 1954 (1999).[10] The court reviewed a substantial amount of other evidence that had been received against the petitioner, and concluded:

> Notwithstanding the obvious significance of [the eyewitness's] testimony, petitioner has not convinced us that there is a reasonable probability that the jury would have returned a different verdict if her testimony had been either severely impeached or excluded entirely.

Id. at 1955. In *Strickler*, the Court reiterated the rule that a petitioner must show "that there is a reasonable probability that his conviction or sentence would have been different had these materials been disclosed." *Id.* This is the requirement

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[10] At issue in *Strickler* were documents prepared by a key witness, Anne Stoltzfus, and notes of interviews with her, both of which called into question the reliability of her testimony and her identification of *Strickler*. Those undisclosed materials, which could have been used to impeach her, revealed "[t]he contrast between (a) the terrifying incident that Stoltzfus confidently described in her testimony and (b) her initial perception of the event `as a trivial episode of college kids carrying on' that her daughter did not even notice." *Strickler*, 119 S. Ct. at 1948.

for the showing of materiality when analyzing the impeachment material alleged here to have been suppressed.

As for the materiality element of a perjured testimony claim, the Supreme Court has held that perjured testimony is material unless it is "harmless beyond a reasonable doubt," *Bagley*, 105 S. Ct. at 3382, and that "a new trial is required if `the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . .'" *Giglio v. United States*, 92 S. Ct. 763, 766 (1972) (quoting *Napue v. Illinois*, 79 S. Ct. 1173, 1178 (1959)). "To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record." *Yates v. Evatt* , 111 S. Ct. 1884, 1893 (1991), quoted in, *United States v. O'Keefe*, 128 F.3d 885, 894 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1525 (1998).

C. Application of the Law to This Case

A materiality determination under *Brady* and its progeny regarding suppressed evidence, and under *Napue* and its progeny regarding false testimony, is a mixed question of law and fact. *See United States v. O'Keefe*, 128 F.3d 885, 893-94 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1525 (1998). In ruling on this issue, this Court has the advantage of having presided over the entire trial, having seen and had opportunity to observe all of the numerous witnesses throughout their direct and cross examinations, and having had opportunity to see and consider all of the other evidence received at trial. It is perhaps for this reason that the Fifth Circuit in applying an abuse of discretion standard on appeal, has stated that the standard "is necessarily differential" to the trial court, which has "seen the impact of witnesses on the jury" and "observed the demeanor of the witnesses." *O'Keefe*, 128 F.3d at 893.

In reaching judgment on this issue, which the Court advised the parties would be evaluated under the summary judgment standard (Document No. 450), the Court accepts as true the competent summary judgment evidence that is most favorable to Defendant-Petitioner who resists the Government's request for a Rule 8a determination. Thus, although controverted by the Government's evidence, the Court accepts as true the testimony of Ms. Villanueva in paragraphs three and four of her Declaration that she was present when federal agents conducted two interviews of Resendez prior to the trial of Abrego, that she was present on one occasion when Resendez and Assistant United States Attorney Annis met prior to Abrego's trial, and that the Government agreed (a) to purchase Resendez's properties in Mexico; (b) to provide United States citizenship for Resendez and his family; (c) to a change of identity and personal protection for Resendez; (d) to purchase a house in the United States for Resendez; and (e) to obtain employment for Resendez in the United States. The Court also accepts as true the implication of this evidence, namely, that Resendez lied by denying and minimizing the nature of those promises and that the Government did not during trial correct those lies or provide to Defendant- Petitioner the details of the foregoing agreement.

After having considered the competent evidence in a light most favorable to Defendant-Petitioner and after having considered the requirements for materiality set forth above, and having further considered the prolonged, wide-open, and crushing cross-examination of Resendez made by Abrego's defense counsel, and after having considered the numerous other witnesses and overwhelming amount of evidence offered against Abrego during the lengthy trial-unrelated to Resendez and his "deal" with the Government-the Court finds as a matter of law that the evidence allegedly suppressed was not material; that is, there is no reasonable probability that the result of the trial would have been

different had the entirety of the Government's agreement with Resendez been disclosed. Likewise, the Court finds that the perjured testimony claim fails because Resendez's alleged perjury was not material; that is, there is no reasonable likelihood that that aspect of Resendez's testimony affected the judgment of the jury and, therefore, Resendez's testimony on those points-whether perjured or not-was harmless beyond a reasonable doubt.

A careful review of portions of the withering cross-examination to which Resendez was subjected helps to put Abrego's present complaint in context. Resendez was shown at the time of trial to be unemployed and receiving monthly cash payments from the Government, which payments he said he was using to pay rent for his apartment; he was shown to be under federal indictment in this district, while conceding that the Government had not arrested or prosecuted him and was letting him walk free without bond; he admitted to having knowledge of the Government's Witness Protection Program, although he claimed not to know whether he would remain in the United States or return to Mexico; he conceded that he knew about the $2 million reward offered by the Government for the capture and arrest of Abrego and, although never unequivocally renouncing or vowing not to apply for it, claimed at trial that he did not plan to apply for it; he admitted that his prior statements to Mexican authorities were in direct conflict with the criminal culpability that he was now attributing to Abrego in his trial testimony; and he conceded that he was a long-time cocaine addict, although expressing the belief that his cocaine addiction had not impaired his memory. All of these lines of inquiry were thoroughly explored, as can be seen in the following excerpts:

Cross-Examination regarding Resendez's Agreement with the Government.

Q. I take it that you have something in writing between you and Ms. Melissa Annis regarding your security.

A. No.

Q. Do you have anything in writing between you and any American agency regarding your security?

A. No.

Q. Do you have anything in writing between any governmental agency and you that you are not going to be prosecuted for anything that you have done in the past?

A. No.

Q. What is your understanding of an agreement between you and the representatives of the American government as to whether or not you are going to be charged or not for anything?

A. I don't know.

Q. Well, at the present time you are receiving money from the American government, right?

A. Well, no.

Q. Have you not received $1,700 per month for the last couple of months?

A. Well, that is for the payment of the apartment.

Q. Well, that is money, isn't it?

A. I apologize.

Q. You have received money for your apartment?

A. Yes.

Q. And you have received more than your rent money, right?

A. No.

Q. Well, did you not receive in August about $1,336?

A. That was for the apartment. That was only once.

Q. Well, did you receive this month $1,700?

A. This month? Well, I have not received anything for this month. Today is the lst.

Q. Do you expect to receive money October the 1st?

A. Well, to pay for the apartment where I live in.

Q. And how much are you going to receive?

A. What you pay for rent there.

Q. How much?

A. 1,500, 1,600. I do not recall exactly.

Q. Have you gotten this money in cash or a check?

A. They gave it to me in cash.

Q. You are going to get this money from now until when?

A. I don't know.

Q. Well, you are not working, are you?

A. Not presently.

Q. You are an American citizen?

A. No, sir.

Q. You are a Mexican citizen?

A. Yes, sir.

Q. What legal papers do you have to be -- what legal papers do you have to entitle you to be in the United States right now?

A. I have a permit.

Q. Who gave you the permit?

A. Immigration.

Q. For how long did you get that permit?

A. I don't recall, sir.

Q. Is this a tourist permit?

A. I think so. It is to be here temporarily in the United States.

Q. So, I take it you plan on going back to Mexico.

A. I don't know.

Q. Well, what happened to those criminal charges that you had pending against you from Brownsville?

A. I don't know yet, sir.

Q. You have a pending indictment coming out of the federal courthouse out of Brownsville, Texas, right?

A. I couldn't tell you, sir.

Transcript, Vol. 10 (Document No. 338) at 89-92.

Q. So, is it your understanding, sir, that you have a current indictment in the federal court with a number 93-152?

A. It may be.

Q. You know you have those charges, right?

A. Might be.

Q. And you have not yet been arrested for those charges? A. Well, no, sir. Here I am.

Q. You haven't made bond?

A. No, sir.

Q. You haven't contacted a lawyer?

A. No, sir.

Q. And -- but you have discussed your pending charges with American agents, right?

A. Well, with American agents I have not discussed them, sir.

Q. Well, sir, I have been given some notes from an American agent wherein you have told this agent that you wanted help with a lawyer for the 1,700-pound case that you have pending in Florida.

A. I don't remember that.

Q. What agents have you spoken to?

A. With what agents have I spoken? With the lady US attorney and two other agents.

Q. What are the names of the two other agents and when did you speak to these two other agents?

A. Oh, sir, I don't remember.

Q. Well, how long have you been in this country?

A. In this country I have been like for two months, I think.

Q. Well, today is October the 1st of 1996.

A. Uh-huh.

Q. We know that the American government has already paid your rent for two months. That is for the month of August and September. Is that correct?

A. It must be.

Q. So, you must have arrived in the United States either the latter part of July or the early part of August.

A. It may be.

Q. Well, are you having trouble remembering these dates, sir?

A. No. No, sir. It is that I don't remember, sir, because I am in a big problem here.

Q. Well, you are not being prosecuted for anything in the United States.

A. Not so far.

Q. You are getting your monthly payments for the apartment for you and your family, right?

A. Yes.

Q. You don't work?

A. No, sir.

Q. You haven't worked since you were an ex-police comandante, correct, in 1985?

A. Yes, of course.

Transcript, Vol. 10 (Document No. 338) at 93-95.

Q. Insofar as coming to the United States, sir, have you heard of an American program called the witness protection program?

A. Yes, sir.

Q. And regarding your status here in the United States, what is your understanding as to how you fit into the witness protection program?

A. I don't know that yet, sir.

Q. Do you have scheduled an appointment with American officers to be enrolled in the witness protection program?

A. No, sir.

Q. Well, how do you expect to eat while you are in the United States?

A. I have a little money, sir. I have a little money also back there in Mexico. I am going to sell. I don't know. I don't know what is going to happen.

Q. Well, in that May 31st statement, you told the Mexican prosecutor that you owned 30 cows, two horses and some kabrios, right?

A. Yes, sir.

Q. Have you sold those animals yet?

A. Not yet, sir.

Q. Well, I guess you plan to sell them, right?

A. I believe so.

Q. And that is how you are going to live in the United States for the rest of your life?

A. I don't know, sir, if I will live here or I will go back to Mexico. I don't know. I don't know what is going to happen.

Q. If you go back to Mexico -- you are admitting here that you lied in Mexico, right? You can't go back to Mexico, right? That is why you came over.

A. I don't know where I am going to go, sir.

Transcript, Vol. 10 (Document No. 338) at 146-147.

Cross-Examination Regarding Reward(s):

Q. How much money did you get from the Mexican or the American government for turning in Juan Garcia Abrego?

A. How much are they giving me? Nothing, sir.

Q. But you did turn in Juan Garcia Abrego?

MS. ANNIS: Again, I object, Your Honor.

THE WITNESS: Yes, sir.

THE COURT: Well, overruled.

THE WITNESS: Yes, sir.

BY MR. CANALES:

Q. And by saying you turned him in, you are the one that told the police where he was staying the night he was arrested, correct?

A. Yes, sir.

Q. And your son was there with him?

A. Yes, sir.

Q. What is your son's name?

A. Julio Resendez.

Q. And you set up the whole thing so that Mr. Juan Garcia Abrego would be arrested by the Mexican police, correct?

A. Well, I did not make all the arrangements, no, that night.

Q. What arrangements did you make?

A. To -- for fear of Juan Garcia Abrego because of the pressure -- because of the fear I have for the pressure he had on me, brother, so as not to fall in jail again, either my son or I or anybody from my family. But I never did it for money.

Transcript, Vol. 10 (Document No. 338) at 96-97.

Q. Let me show you this particular piece of paper and ask you whether or not you recognize this document as a document that contains your signature?

A. Yes, sir.

Q. Can you -- does that particular document have your signature on each page?

A. Yes, sir.

Q. And at the end of that document, does that document contain your signature also?

A. Yes, sir.

Q. So, you would agree, then, sir, that that particular document that you have there was made on May 31st, 1996, in Monterrey, Mexico, right?

A. Yes, sir.

Q. And it was a statement that was given under oath; is that correct?

A. Well, the laws are not the same down there as up here, sir. I am only asking you, Mr. Attorney, with all my respect that you deserve, that I came to here to tell the truth here, only the truth.

Q. Well, the truth because you expect to get a little reward, right?

A. No, sir. No.

Q. You are making an application for a $2 million reward for turning in your best friend, Juan Garcia Abrego, right?

A. No, sir.

Q. You have heard about that, right?

A. Well, they've been having -- they've been saying that for a long time, sir, but that has never crossed my mind.

Q. Well, let's back up here a little bit. It hasn't crossed your mind, but have you discussed it with anybody here?

A. Discussed it with somebody? How come? I don't understand you.

Q. Well, have you talked about it with any of the Mexican federales?

A. No, sir.

Q. But you plan to make that application for that reward, right?

A. No, sir.

Q. I mean, that is why you are here, because you have to be arrested and convicted before you get the reward, right?

MS. ANNIS: Your Honor, I am going to object. That is a misstatement. It is only to the arrest, has nothing to do with testimony or conviction or anything else.

THE COURT: Well, sustained.

BY MR. CANALES:

Q. Do you know, sir, what the conditions are for you to be able to receive the reward for the information

that led to the arrest of your friend, Juan Garcia Abrego?

A. No, sir. And, also, I am not interested in them either, sir.

Transcript, Vol. 10 (Document No. 338) at 98-100.

Cross-Examination Regarding Inconsistent Statements:

Q. Were you arrested for anything in Mexico between January, 1996, and May, 1996?

A. No, sir. But I did go to the Attorney General's Office to debrief two or three times.

Q. And you did go on May 31st, 1996, as that document in front of you reflects, right?

A. Yes, sir. Yes.

Q. And who was interviewing you in this particular document? Who was asking you questions?

A. Federal Public Ministry.

Q. And were they asking you questions regarding your involvement with Juan Garcia Abrego?

A. Well, yes, sir. With me and with Juan Garcia Abrego.

Q. And did you tell in this particular statement, sir, that you have always declared Juan Garcia Abrego to be your friend and that you and Juan Garcia Abrego throughout the years traveled openly all over Monterrey?

A. Yes, sir.

Q. And did you tell the federal agents at this point in time that you had no knowledge of any illegal wrongdoings by Juan Garcia Abrego or his family?

A. Yes, sir. That was my defense. I did that to defend myself.

Q. Wait a minute. You had already six months before provided information for the arrest and capture of Mr. Garcia Abrego, correct?

A. Yes, sir.

Q. Mr. Garcia Abrego was already in Houston, Texas?

A. Yes, sir.

Q. You had not been arrested for anything between January and May of 1996. Correct?

A. Correct.

* * *

Q. Did you, in 1994, defeat the American extradition attempt to send you from Mexico to the United States regarding that Brownsville indictment?

A. No, sir. I haven't had any fight with the American government.

Q. In Mexico, did the judge rule in your favor and refuse to indict you from Mexico to the United States to face those charges out of Brownsville?

A. The one that dominated -- or the one that determined what was going to happen about that was the Ministry of Foreign Affairs, sir, because I was a Mexican citizen.

Q. And because you were a Mexican citizen, Mexico will not extradite its Mexican nationals, correct?

A. I don't know, sir.

Q. Well, that is why you were not extradited, right, because you are a Mexican national?

A. I think, sir.

* * *

Q. You were already cooperating with the Mexican government.

A. I don't understand.

Q. On May 31st, 1996, did you tell a bunch of lies in the document that you have there in front of you?

A. They were lies, sir, if you say things like that. You people, ladies and gentlemen of the jury, it was to defend myself because I did not want to land in jail again.

Q. Because you didn't want to land in jail in Mexico; is correct?

A. Nowhere. I don't want to land in jail anywhere, sir.

Q. So, in this particular document that you have there in front of you, the May 31st, 1996, document, you knowingly and intentionally lied to the Mexican officials, correct?

A. Well, because of what they were asking from me, questions that had no foundation.

Q. Well, they asked you, right, are you not -- were you involved in the drug dealing with Garcia Abrego?

A. Well, I don't remember, sir. But it is there in the papers.

Q. I have those papers there in front of you and I have got it highlighted in yellow.

A. Correct. There were -- they were -- well, how could I tell you? Well, those were indications that my lady attorney, my female attorney, gave me to be able to work my defense. Here is her signature.

Q. And no doubt about it. You were under oath -- under Mexican oath to tell the truth when you made the May 31st, 1996 statement, correct?

A. They never told me anything about swearing down there, sir.

Q. Does the paper in front of you say you were under oath?

A. I don't know, sir.

Q. Does the paper in front of you say you were supposed to tell the truth?

A. Possibly.

Transcript. Vol. 10 (Document No. 338) at 101-106.

Q. Sir, do you recall telling the newspaper people that Mr. Juan Garcia Abrego was your friend of 30 years and that you denied doing any illegal activity with Mr. Juan Garcia Abrego?

A. Yes, sir. I am repeating to you because of my liberty, my freedom.

Q. So, you did make those statements to the newspaper?

A. Yes, sir.

Q. And you basically repeated what you told the newspaper; you are repeating what you had said before of May 31st, 1996, correct?

A. Well, similar. Possibly.

Q. At this point in time when you were talking to the reporters, you were not under oath, correct?

A. No, sir.

Q. But, nevertheless, you told them the same thing -you told the reporters the same thing you had said before on May 31st?

A. Well, similar, because of the indications that my lady attorney gave me also.

Q. Are you blaming your lady attorney for all these lies?

A. No. No.

Q. So, you knew what you were doing?

A. Yes, sir. To defend myself.

Transcript, Vol. 10 (Document No. 338) at 110.

Q. Do you recall, sir, some months -- sometime between June and August of 1996, where you were approached by Juan Garcia Abrego's son to see whether you would be a witness for him in this case?
A. Yes, I remember. Of course.

Q. And what did you tell Juan Garcia Abrego's son as to whether or not you would be able to testify in favor of Juan Garcia Abrego in this case?

A. I told him out of necessity, that, "Yes, I would talk if the attorneys would answer for me."

Q. What do you mean answer for you?

A. Because, you know, of the very situation I was in, I told him that very possibly I might have a problem here in the United States.

Q. So you would only come over if the Garcia Abrego lawyers would kind of assure you that you were not going to be harmed or be taken to jail while you were in the United States?

A. It was something to say at the moment, sir.

Q. Well, that is exactly what you have got here in this case today, right? Except you are getting it from the government, right?

A. I don't know.

Q. Well, you are not being prosecuted for the Brownsville matter, right?

A. I don't know, sir.

Q. You are getting money on -- you are getting your security taken care of, right?

A. That is true.

Q. But you lied to Juan Garcia Abrego's son?

A. Possibly.

Transcript, Vol. 10 (Document No. 338) at 114-116.

Cross-Examination Regarding Resendez's Cocaine Use/Addiction:

Q. You told this jury that, prior to 1984, you were a cocaine addict, correct?

A. Yes, sir.

Q. And you quit being an addict when?

A. Since I landed in jail, sir.

Q. You have told this jury that you landed in jail sometime in, what, '94?

A. On April 30, 1994.

Transcript, Vol. 10 (Document No. 338) at 113-114.

Q. Well, how do we know when you are lying possibly? How do we know that?

A. I don't know, sir.

Q. Well, you -- you are a cocaine addict, right?

A. I was a cocaine addict.

Q. And you were smoking apparently, right?

A. Yes, sir.

Q. And how long were you an addict?

A. Well, several years, sir.

Q. The years we are talking about here in this case, the years '87, '88, '89, '90, '91? Those are the years you were hitting it real hard, right?

A. Well, possibly, yes.

Q. Even when you were a cop, right?

A. Well, yes. Yes, but I didn't do it in the way I did in the years like '85, '87, '88.

Q. I mean you were one of these Mexican police officers that you had your hand out every day, rightings, for somebody to give you a bribe?

A. No, sir.

Q. You never took a bribe?

A. No, sir.

Q. You never protected anybody?

A. No, sir.

Q. You never protected and you never offered protection to Juan Garcia Abrego?

A. No, sir, I didn't have -- I didn't have a reason to do it.

Q. And during the years you were a police officer, Juan Garcia Abrego had nothing to do with you?

A. He was my friend, Sir.

Q. That is because you were officer friendly, right?

THE INTERPRETER: I beg your pardon, I didn't hear?

BY MR. CANALES:

Q. That is because you were an officer that was friendly?

A. It may be like that because, you know, my record says of all the good jobs I did when I worked for the police. What I was.

Q. Does your record reflect that during this period of time you were high on cocaine?

A. I don't think so, sir.

Q. Well, sir, how bad did this cocaine affect your mind?
A. I don't think it affected me.

Q. And it didn't affect you because today you can remember conversations that occurred eight, nine, ten years ago, correct?

A. It may be.

Transcript, Vol. 10 (Document No. 338) at 116-117.

Q. Let's see. The year 1990, you were living where?

A. In 1990, I was living in Brownsville and I went to see him in Monterrey, Nuevo Leon.

Q. Did you go see him every month in Monterrey?

A. What do you mean, every month of the year?

Q. Well, you said you saw Juan Garcia Abrego in 1990. You went to visit him in Monterrey, correct?

A. In 1990, sir, in December.

Q. What about the months before?

A. Well, no, sir, no. I don't remember about that, but I went to see him. I went to see him before he went to Chicago, sir.

Q. So when did he go to Chicago?

A. I think in 1990, sir.

Q. Is this something you remember very clearly from your coke snorting days?

A. I don't know. I don't know how you perceive it.

Q. Well, are you telling this jury, sir, that because of your coke snorting or coke smoking activity, as heavy as you were, that this somehow or another helps your memory?

THE INTERPRETER: I did not hear the question.

BY MR. CANALES:

Q. Does it help your memory, the fact that you were a cocaine addict?

A. No, no, I don't think that. I don't think so.

Transcript, Vol. 10 (Document No. 338) at 119-120.

Q. Sir, I would like to ask you about your memory retention ability

A. I think it does it well, sir.

Q. And you think the fact that you were a heavy addict of cocaine usage helped you in your memory retention?

THE INTERPRETER: That is what he asked the first time.

THE WITNESS: I don't know.

BY MR. CANALES:

Q. A lot of things that you have testified about today, sir, you didn't give us dates, places or specifics. Why is that, sir?

A. Well, those are things that -- I lived with him, with Juan.

Q. You lived with Juan, but you never were with Juan in Chicago, right?

A. No, sir.

Q. You never -- you never -- you never were with Juan in Matamoros, correct?

A. Yes.

Q. You were at his office?

A. Yes, sir.

Q. You worked there with him at his office?

A. Well, I worked with him, sir, everywhere. Not in his office. Whatever he told me to do, I did.

Q. These are the years that you have told us was your highest use of cocaine, correct?

A. I think that is so.

Transcript, Vol. 10 (Document No. 338) at 121-122.

Q. Your cocaine addiction affected your memory only if it would help Juan, right?

A. I am sorry?

Q. Your cocaine addiction did not affect your memory regarding anything negative about Juan, correct?

A. No. I don't think so.

Q. As far as you are concerned, your cocaine addiction had no effect at all on your brains?

A. I don't think so. When I was an addict -- no, I am not an addict anymore.

Q. And today you can remember everything that happened during the years -- those five or six years that you were an addict?

A. I believe so. Most part.

Transcript, Vol. 10 (Document No. 338) at 156-157.

The foregoing examples of defense counsel's relentless cross-examination of Resendez raised serious questions about Resendez's veracity, to say the least. Defense counsel's persistent and repeated hammering of Resendez regarding the prospect of a $2 million reward for helping to capture Abrego, together with all of his other cross-examination, finally culminated in Resendez literally begging, on two occasions, to be relieved from further cross-examination:

Q. Well, the reason I am asking you this question, sir, is because what reason do you have to tell a lie on May 31st,1996, if you are cooperating in the apprehension of Juan Garcia Abrego six months before? Why are you telling lies in May when you are helping the government capture Juan Garcia Abrego?

A. I will tell the attorney once more and to let you know that you have already asked me several times about the same, several questions about the same. I want to repeat this and I wish this will be the last time. Don't take me wrong, Mr. Attorney. I did this for my freedom and my defense.

Q. I fully understand that. You lied to the Mexican officers for your defense. I understand that. Is that correct?

A. It was a matter -- it was under my attorney's advice. I would beg of you, Mr. Attorney, with all due respect that you deserve, to ask something else that is necessary, but not the same -- the same again. Because, after all, I am going to give you the same answer. It is for my freedom, in my defense and following my attorney's advice.

Transcript, Vol. 10 (Document No. 338) at 139.

Q. Do you know whether or not there was a cash reward offered by the Mexican Government for the apprehension of Juan Garcia Abrego?

A. Well, they have been saying that for a long time, sir.

Q. And how much was it?

A. I don't remember, sir. I don't remember right now. I don't know.

Q. But you did know about the $2 million American reward, right?

A. Well, it is still out, sir. They said that they were going to offer that reward. But please understand me. I am not here for that reward. I am seeing and I beg

of you, Mr. Attorney, that you are asking me the same, the same, the same.

Q. So what is the answer to the $2 million reward? Are you going to -- what is the answer to that?

A. No, sir. I am not even considering that, sir. I already told you that, Mr. Attorney. What I want is peace, tranquility for me and my family, if I can. And I please ask of you, nothing else to ask. Please let me go. I can't go on anymore.

Transcript, Vol. 10 (Document No. 338) at 147-148.

Although the existence of an agreement between Resendez and the Government upon the terms contained in the non-hearsay portions of Villanueva's Declaration (purchase of Resendez's Mexican properties, U.S. citizenship for Resendez and his family, change of identity and personal protection, purchase of a house in the United States, and employment) would have provided defense counsel with some additional material, its incremental value for impeachment purposes would have been inconsequential in the context of the overall cross-examination. In more than forty years of experience in the courtroom, first as a lawyer and then on the bench, this Judge has never before or since seen a witness so thoroughly beaten down by cross-examination. When Resendez finally stepped down, he had been fully revealed as a self-confessed drug trafficker, a long-time cocaine addict now in recovery, a shameless opportunist, and an admitted liar when needed to protect himself from returning to prison. Resendez's agreement with the Government, financial and otherwise, was a major

subject of extensive cross-examination of Resendez. A prominent and recurring theme of this crossexamination was the Government's offer of a $2 million reward for information leading to the arrest of Abrego, who Resendez testified he had turned in to the police. Resendez denied at trial that he had any present intention to collect the reward money but never did he forswear that he was entitled to the reward or unequivocally vow that he would not change his mind and apply for the reward at some time in the future. Given everything else that was disclosed during cross-examination about Resendez and his unsavory past, it would come as no surprise that Resendez, after the jury returned a verdict finding Abrego guilty, after the Court imposed a sentence of life in prison, and after the Bureau of Prisons had placed Abrego in a maximum security prison, would apply for the $2 million reward. After all, the reward obviously was offered by the Government to induce someone just such as Resendez, who was inside the organization and close enough to Abrego to know his movements and whereabouts, to lead law enforcement to El Senor. Resendez admitted on cross-examination that he had done so. In fact, it more likely would have surprised observers of the trial if they had learned that Resendez had not applied for the reward money after Abrego's conviction, sentence, and imprisonment for life. The difference between his having all or part of the $2 million reward in hand for having turned in Abrego and having it available as a post-trial option for which to apply would seem inconsequential. There is, of course, no competent summary judgment evidence that the Government ever promised him $2 million or any portion thereof for his testimony All that can be drawn from the admissible evidence is that Resendez claimed to be qualified to receive the reward money for Abrego' s capture and arrest

and, in an exercise of apparent discretion, chose not to do so until after Abrego was convicted and sentenced. In the overall context of Resendez's testimony and defense counsel's cross-examination of Resendez, the "deal" described in paragraphs 3 and 4 of Villaneuva's Declaration was simply not material.

Whether the additional impeachment evidence was material depends also upon viewing it in the context of all of the other evidence at trial. Carlos Resendez was but one of several important witnesses for the Government. Resendez had known Abrego for thirty years, and had worked full-time for him in the drug trafficking business since 1985 or 1986. In addition, he was one of the closest co-conspirators to Abrego, one who could grant or deny to others access to Abrego, and one who was privy to most of the organization's activities and Abrego's leadership role in those activities. Entirely apart from Resendez, however, great quantities of substantial and convincing evidence implicated Abrego. Several witnesses, including co-conspirators, also identified Abrego as the leader of the drug and money laundering conspiracy. Claudio De la O, an FBI employee who was posing as a corrupt agent, testified that he spoke with Abrego by phone on several occasions, and from those conversations came to recognize that Abrego was the leader of the drug and money laundering conspiracy that he was investigating. Jaime Rivas Gonzales, a co-conspirator, testified that Luis Medrano had identified Abrego as "El Senor." Tony Ortiz, another co-conspirator, testified that Luis Medrano and various other participants in the conspiracy told him that Abrego was "El Senor" (the man) and "El Jefe" (the boss), and that from his observations of Abrego with other high ranking members of the conspiracy he was convinced that

Abrego was the boss, and that he had full knowledge of the details of the conspiracy's drug trafficking and money laundering activities. Carlos Rodriguez testified that when he met with Abrego and other members of the conspiracy, Abrego was introduced to him as "El Patron" and "El Jefe." Rodriguez also testified that because Abrego was the leader of the drug and money laundering conspiracy, he had been obliged to ask Abrego for permission to live in Matamoros, Mexico. Francisco Perez, Abrego's own cousin, testified that he worked for Abrego in the drug trafficking business from 1979 to 1993. In addition to the testimony of numerous witnesses other than Resendez, evidence was introduced at trial of the vast sums of money and properties that Abrego had accumulated. Victor Garcia, an accountant who was employed by the organization, testified how he laundered the organization's drug proceeds upon Abrego's instruction. As if all of that were not enough, evidence was received that Abrego himself had confessed to his role in the drug and money laundering conspiracy. See summary of evidence presented at trial in Appendix A to the United States Memorandum in Support of its Answer to Motion for New Trial and to § 2255 Motion and its Request for Rule 8(a) Determination (Document No. 443). On appeal, in a very detailed and thorough opinion, the Fifth Circuit found substantial evidence of Abrego's guilt:

> [T]he record contains evidence more than ample to support the jury's conclusion that Garcia Abrego engaged in a conspiracy that had as its objects the violation of federal narcotics and money laundering laws. The testimony of numerous coconspirators establishes that Garcia Abrego cast a conspiratorial net that was far reaching and encompassed a large

> number of individuals who aided in his drug trafficking enterprise.

Abrego, 141 F.3d at 156.

From a review of the record, and taking the admissible facts contained in Villanueva's Declaration in the light most favorable to Abrego, as is required in the context of FED. R. CIV. P. 56, the Court concludes that the jury would not have returned a different verdict on any of the counts if the terms of the agreement between the Government and Resendez had been disclosed, if Resendez had been further impeached with the terms of the Government's alleged agreement, or if Resendez had been precluded from falsely denying the existence of the agreement he reached with the Government. Suppression of the existence of the agreement as alleged in paragraphs 3 and 4 of Villanueva's Declaration denied to Abrego's counsel a small amount of additional impeachment evidence that could have been used against only one government witness, Carlos Resendez. For the reasons detailed above, however, its suppression was harmless beyond a reasonable doubt, did not result in an unfair trial for Abrego, and does not at all undermine the Court's confidence in the jury's verdict. Likewise, Resendez's allegedly perjured testimony regarding the agreement described in paragraphs 3 and 4 of Villaneuva's Declaration was not material in that there is no reasonable likelihood that it could have affected the judgment of the jury; to the contrary, in the full context of this case, such would have been harmless beyond a reasonable doubt. *See e.g.*, *Strickler*, 119 S. Ct. at 1954-55; *Knox v. Johnson*, 224 F.3d 470, 478 (5th Cir. 2000) (alleged false testimony by State's witness was not material where false testimony had no bearing on the defendant's

participation in the murder and a "number of other witnesses corroborated her relevant testimony"), *cert. denied*, 121 S. Ct. 1610 (2001); *Creel v. Johnson*, 162 F.3d 385, 391-392 (5th Cir. 1998) (finding that the State's witness's alleged perjury was not material because the perjured testimony was not related to the defendant's guilt, the witness was subjected to extensive cross examination, other witnesses corroborated the testimony of the witness on the issue of the defendant's guilt, and the alleged perjury would have only provided the defense with additional, cumulative impeachment material), *cert. denied*, 119 S. Ct. 2027 (1999).

VII. Motion for New Trial and Related Motions

Defendant-Petitioner Abrego has also filed a Motion for New Trial or, in the Alternative, Request for Evidentiary Hearing (Document No. 431), and Request for Discovery Re Motion for New Trial (Document No. 432). These motions are predicated upon the same accusations that are made in Abrego's § 2255 motion. For essentially the same reasons stated above in the detailed analysis of Abrego's § 2255 motion, these motions will also be denied.

VIII. Denial of Certificate of Appealability

A certificate of appealability from a habeas corpus proceeding will not issue unless the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard "includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v.*

McDaniel, 529 U.S. 473, 484 (2000) (internal quotations and citations omitted). Stated differently, the petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*; *Beasley L. Johnson*, 242 F.3d 248, 263 (5th Cir.), *cert. denied*, 122 S.Ct. 329 (2001). A district court may deny a certificate of appealability *sua sponte*, without requiring further briefing or argument. *Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000). For the reasons set forth above in considering and denying Abrego's § 2255 motion, the Court has determined that Defendant-Petitioner Abrego has not made a substantial showing of the denial of a constitutional right. A certificate appealability from this decision will therefore be denied.

IX. Order

For the reasons set forth above, it is

ORDERED that Petitioner Juan Garcia Abrego's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Document No. 429), Defendant-Petitioner's Motion for New Trial (Document No. 431), and Request/Motion for Discovery (Document No. 432), are DENIED, and the Government's Request for Rule 8(a) Determination (Document No. 441) is GRANTED, and this case brought pursuant to 28 U.S.C. § 2255 by Defendant-Petitioner Juan Garcia Abrego against Respondent United States of America is DISMISSED on the merits; and it is further ORDERED that a Certificate of Appealability is DENIED.

The Clerk will enter this Order and provide a correct copy to all counsel of record.

SIGNED at Houston, Texas, on this 7th day of June, 2002.

EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CRIMINAL ACTION NO. H-93-167

UNITED STATE OF AMERICA,

Plaintiff-Respondent,

v.

JUAN GARCIA ABREGO,

Defendant-Petitioner.

Entered on July 29, 2002

ORDER

Pending is Defendant's Motion for Leave to File Amended Notice of Appeal or, in the Alternative, to File New Notice Re Motion for New Trial and Discovery Re New Trial (Document No. 471), to which the United States has filed its response in opposition. After having carefully considered the motion and its supporting affidavits, the response, Defendant's Reply Appellate Rules of Procedure 3 and 4(a) and (b), and the case law interpreting and applying the Rules, the Court finds that Defendant Abrego has made a sufficient showing of excusable neglect or good cause to warrant the requested extension of time. Accordingly, it is

ORDERED that Defendant's time to filing his Amended Notice of Appeal to clarify that Defendant is appealing not only from the Court's Order and Final Judgment Denying Petitioner's 28 U.S.C. § 2255 motion but also from its entirety of the Court's Memorandum and Order entered June 7, 2002, is GRANTED, and the time for filing an amended notice of appeal is ENLARGED through July 12, 2002, the date that Defendant filed his Amended Notice of Appeal.

The Clerk shall notify all parties and provide them with a signed copy of this Order.

SIGNED at Houston, Texas, on this 25th day of July, 2002.

EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATE COURT OF APPEAL
FIFTH CIRCUIT
OFFICE OF THE CLERK

August 5, 2002

Mr. Michael Pancer
105 W F Street, 4th Floor
San Diego, CA 92101

Mr. Kent A. Schaeffer
Bires & Schaffer
712 Main Street, 31st Floor
Houston, TX 77002

Mr. Robert James Waters
2115 Main Street
Santa Monica, CA 90405

No. 02-20723 USA v. Abrego
USDC No. H-99-CV-3110
H-93-CR-167-8

Appealing Party: Mr. Juan Garcia Abrego
(Notice of Appeals filed 7/12/02)

We have docketed the appeal as shown above, and ask you to use the case number above in future inquiries.

You must pay the court of appeals' $100 docketing fee and $5 filing fee to the **district court clerk**, and notify us of the

payment within 10 days from the date of this letter. If you do not, we will dismiss the appeal, see 5TH CIR. R. 42.3.

Counsel who desire to appear in this case must sign and return the attached appearance form as required by 5TH CIR. R. 46 within 10 days from this date. You must name each party you represent, see FED. R. APP. P. 12(b) and 5TH Cir. R. 12.. If you fail to do so, we will remove your name from the docket. Pro se parties do not need to file an appearance form.

Sincerely,

CHARLES R. FULBRUGE III,
Clerk

By: Jodi Rodrigue
Deputy Clerk
504-310-7718

Enclosure
cc w/encl: Mr. James Lee Turner

DKT-1

UNITED STATE COURT OF APPEAL
FIFTH CIRCUIT
OFFICE OF THE CLERK

January 30, 2003

Mr. Robert James Waters
2115 Main Street
Santa Monica, CA 90405

No. 02-20723 USA v. Abrego
USDC NO. H-99-CV-3110
H-93-CR-167-8

We received your motion for briefing schedule for appeals on defendant's motion for new trial based on newly discovered evidence. The court already has issued its final ruling and will not rule upon the matter further, therefore, we are taking no action on this motion.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: _____
Amanda Maria Sutton, Deputy Clerk

cc. Ms. Kathlyn Giannaula Synder

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-20723
USDC No. H-99-CV-3110
USDC No. H-93-CR-167-8

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUAN GARCIA ABREGO,

Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Texas

Entered on October 7, 2002

ORDER:

In January 1997, Juan Garcia Abrego, now federal prisoner No. 09935-000, was convicted of five counts of money laundering, ten counts of aiding and abetting the possession with intend to distribute cocaine, three counts of transporting funds to a place outside the United States, one count of conspiracy to commit money laundering, and one count of conducting a continuing criminal enterprise. He now seeks a certificate of appealability ("COA") in order to appeal the denial of his motion to vacate, set aside, or correct sentence, filed pursuant to 28 U.S.C. § 2255. This court may grant a COA only if Abrego has made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. Sec. 2253(c)(2).

Abrego argues that the Government failed to correct perjured testimony by, and suppressed impeachment evidence regarding, a Government witness. This court will consider only the declarations, or portions thereof, submitted by Abrego that constitute competent summary judgment evidence. *See* FED. R. CIV. P. 56(d); *Fowler v. Smith*, 68 F.3d 124, 126 (5th Cir. 1995). Regarding his claim based on perjured testimony, Abrego has failed to show that the challenged testimony was actually false. *See United States v. Mason*, 293 F.3d 826, 828 (5th Cir. 2002). He has also failed to show that the allegedly suppressed evidence was sufficiently material. *See United States v. Bagley*, 473 U.S. 667, 683-84 (1985).

Abrego also contends that his trial counsel rendered ineffective assistance by failing to move for a change of venue and for failing to request for the translation of all bench conferences conducted during voir dire. He asserts that prejudicial, inflammatory publicity about his case

saturated the community from which his jury was drawn such that he was entitled to a presumption of a prejudiced jury under *Rideau v. Louisiana*, 373 U.S. 723 (19653). The evidence of pretrial publicity submitted by Abrego does not warrant application of the presumption set forth in *Rideau*. *See Rideau*, 373 U.S. at 723-27; *Calley v. Callaway*, 519 F.2d 184, 205-06 (5th Cir. 1975). He has therefore failed to show that he was prejudiced by his counsel's failure to move for a change of venue on this basis. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). Furthermore, he has failed to show that his counsel's performance was deficient in failing to request for the translation of all bench conferences conducted during voir dire. *Id.* at 687-89. Because he has failed to show any error, the cumulation of his alleged errors did not attain constitutional significance. *See Mullen v. Blackburn*. 9-9 F/2d 1143, 1147 (5th Cir. 1987) ("Twenty times zero equals zero.") (28 U.S.C. Sec. 2254 case).

Abrego has failed to make a substantial showing of the denial of a constitutional right regarding his instant claims. Accordingly, his motion for COA is DENIED.

HAROLD R. DeMOSS, JR.
UNITED STATE DISTRICT COURT JUDGE

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-20723

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JUAN GARCIA ABREGO

Defendant - Appellant

Appeals from the United States District Court for the Southern District of Texas, Houston

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Entered on November 11, 2002

Before BARKSDALE, DeMOSS, and BENAVIDES, Circuit Judges.

BY THE COURT:

A member of this panel previously denied appellant's motion for Certificate of Appealability. The panel has

considered Appellant's motion for reconsideration. IT IS ORDERED that the motion is **DENIED**.

MOT-29

APPENDIX F

United States Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 USC §1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Rule 33, Federal Rules of Criminal Procedure

(a) Defendant's Motion. Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried

without a jury, the court may take additional testimony and enter a new judgment.

(b) Time to File.

(1) Newly Discovered Evidence. Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.

(2) Other Grounds. Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty, or within such further time as the court sets during the 7-day period.

Rule 4 (b)(1)(A)(i), Federal Rules of Appellate Procedure

(b) Appeal in a Criminal Case.

(1) Time for Filing a Notice of Appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.